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Crestwood Cove Apartments Business Trust, dba Cottonwood Creek Apartments and Shangri La UBO v. Shawn Turner and Larsen, Kirkham and Turner : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CRESTWOOD COVE APARTMENTS BUSINESS TRUST, dba COTTONWOOD CREEK APARTMENTS and SHANGRI LA UBO, Appellant, vs.	**BRIEF OF APPELLANT** Appeal No 20040539 District Court No. 020911135
SHAWN TURNER and LARSEN, KIRKHAM & TURNER, Appellee.	Oral Argument Priority No. 15

D. Kendall Perkins (2566)
Attorney for Plaintiff/Appellants
2417 E. 9110 So
Sandy, Utah 84093
Telephone: 801-942-2078

Michael F. Skolnick
KIPP and CHRISTIAN P.C.
Attorneys for Defendants/Appellees
10 Exchange Place, 4th Floor
Salt Lake City, Utah 84111
Telephone: 801-521-3773

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KIPP and CHRISTIAN P.C.
Attorneys for Defendants/Appellees
10 Exchange Place, 4th Floor
Salt Lake City, Utah 84111
Telephone: 801-521-3773

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INTRODUCTION

In the underlying case, an apartment complex, worth in excess of three million dollars, owned by Appellant's predecessor in interest, SHANGRI-LA GARDEN APARTMENTS and SHANGRI-LA APARTMENTS, Inc., a Nevada Corporation. (Hereinafter, SHANGRI-LA) was sold at a sheriff's sale for $8,000.00 to satisfy a $4,767.00 judgment. For reasons not relevant to this appeal, the judgment debtor did not redeem the property within the six-month redemption period. It subsequently filed an action to set aside the sheriff's sale and/or to extend the redemption period to avoid forfeiture of the multi-million dollar property. Shortly after the sheriff's sale, the purchaser quit-claimed its interest in the apartment, for $11,197.00, to UAW Properties, L.C. and DLM Investments, L.L.C.,(Hereinafter, UAW and DLM) which had been created to speculate on the property. SHANGRI-LA filed its action seeking to set aside the sheriff's sale and/or to extend the redemption period in Third District Court Case No 970902686 QT. UAW and DLM responded contesting the setting aside of the sheriff's sale and extension of the redemption period and counterclaimed, asserting in part, conversion and the right to impose the Utah Unlawful Detainer Act. At trial, SHANGRI-LA was represented by Shawn Turner of the firm of LARSEN, KIRKHAM & TURNER (Hereinafter, Turner). UAW AND DLM were represented by Steven B. Mitchell of BIRBIDGE & MITCHELL (Hereinafter, Mitchell). The matter was heard at a two day bench trial before the Honorable Frank G. Noel, District Judge. SHANGRI-LA, as

represented by Turner, did not contest the application of the Utah Unlawful Detainer Act, either in the framing of the issues by the pleadings or at trial, up to the completion of presentation of evidence and final argument. At final argument of the matter, the trial court asked Mitchell to specify what he was claiming on his counterclaim. Mitchell answered that his claim included a claim for unlawful detainer comprised of damages equal to the rents received on the apartments from the time of the unlawful detainer until the action was filed, which rents were stipulated to be $304,333.00 and which damages should be trebled according to the Unlawful Detainer Act. The court asked Turner for his response to Mitchell's claim for damages equal to the received rents, wherein Turner in effect agreed with Mitchell's claim. The trial court entered its Memorandum Decision on May 5, 1998, which in page five thereof, recited that the court felt the parties had not adequately addressed the issue of treble damages and requested briefing of the issue. In his brief on the issue, Turner, for the first time, argued that the Unlawful Detainer Statute did not apply. Turner did not at any time raise the argument that the rule governing redemption, Rule 69 (j) (3) and (7), Utah Rules of Civil Procedure. Paragraph (j)(3) limits what fees a buyer at sheriff's sale can collect in a redemption situation; paragraph (j)(7) limits the application of rents from redeemed property to a credit upon redemption money to be paid.

The trial court entered judgment awarding damages for unlawful detainer of $304,333.00, which damages the court trebled according to the unlawful detainer statute; thus, establishing a redemption amount of nearly one million dollars. SHANGRI-LA retained new counsel and filed a timely notice of appeal from the trial court's decision.

Possession of the apartment complex was turned over to UAW and DLM. Almost immediately, the apartments began to suffer from inept management and inadequate maintenance, to the degree that the property began to suffer diminution in value by reason of the effect of the inept management, inadequate maintenance and the effect of a fire that occurred in one of the apartment buildings, damage from which was not seasonably repaired. SHANGRI-LA was not able to raise the nearly one million dollar redemption fee. SHANGRI-LA was advised by its new counsel that disposition of the appeal could take an additional two or three years. To be able to re-take possession of the apartment complex and eliminate the diminution in value being experienced, and to mitigate its damages, SHANGRI-LA negotiated a settlement of the matter with UAW and DLM, which included a dismissal with prejudice of the appeal after briefing thereof, but prior to the determination of the appeal. Plaintiffs in this action, successors in interest to SHANGRI-LA, then brought this action. (The apartment complex mentioned, was transferred to Crestwood Cove Apartments Business Trust, a Utah Business Trust after the occurrence above outlined, but to avoid confusion, the successor in interest, Crestwood Cove Apartments Business Trust will continue to be referred to as SHANGRI-LA.)

JURISDICTION OF APPELLATE COURT

This court has jurisdiction in this matter pursuant to the provisions of §78-2a-3 (j) Utah Code Ann. (1996) (Cases transferred to the Court of Appeals from the Supreme Court).

ISSUES PRESENTED FOR REVIEW

SHANGRI-LA alleges that Turner failed to contest the application of the Utah Unlawful Detainer Act, §78-36-3; Treble damage provisions, §78-36-10, Utah Code Ann., prior to the completion of evidence and final argument and failed to raise the appropriate provisions of Rule 69 (j), Utah Rules of Civil Procedure as limiting the amount that could be legitimately assessed as part of the redemption fee. Turner's failure resulted in the improper assessment of a redemption fee of nearly one million dollars, a fee SHANGRI-LA did not have. SHANGRI-LA, alleges that to mitigate its damages and eliminate the continuing diminution of value of the apartment complex, it negotiated a settlement agreement with UAW and DLM, and as a part thereof, dismissed its appeal of the trial court's ruling, prior to determination of the appeal.

1. Did the trial court err in finding that Turner's conduct did not constitute malpractice or malpractice per se.
2. If Turner's conduct constituted malpractice, was such malpractice the proximate cause of SHANGRI-LA's incurring a redemption fee of nearly one million dollars and was such malpractice the proximate cause of SHANGRI-LA being placed in the situation of having to settle with UAW and DLM where it paid one hundred thousand dollars, abandoned fire insurance proceeds, lost rent paid to UAW and DLM, and had to accept the return of severely damaged apartments.
3. Did SHANGRI-LA, by settling the matter and dismissing its appeal prior to determination of said appeal, forfeit its right to pursue a malpractice action against Turner.

STANDARD OF REVIEW AND PRESENTATION

1. In reviewing a grant of summary judgment the facts are reviewed in the light most favorable to the losing party and no deference is given to the trial court's legal conclusions. Summary judgment is appropriate if the pleadings and all other submissions show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Swift Stop Inc. v. Wight, 845 P.2d 250, 250 (Utah App. 1992) Atkinson v. IHC Hospitals, Inc.* 798 P.2d 733, 734 (Utah 1990) Ordinarily, whether a defendant has breached the required standard of care is a question of fact for the jury. *Jackson v. Dabney,* 645 P.2d 613, 615 (Utah 1982)

   This issue was preserved below and was raised in SHANGRI-LA's memorandum opposition to Turner's motion for summary judgment. (R. at 80, 86, 87)

2. Proximate cause is an issue of fact and only if there is no evidence upon which a reasonable jury could infer causation, is summary judgment appropriate. *Swift Stop, Inc. v. Wight. Id*

   This issue was preserved below. (Affidavit of Stanley Wade, and SHANGRI- LA's memorandum in opposition to Turner's motion for summary judgment.

   R. at 76 - 78, 87, 89 -91)

3. The question of whether SHANGRI-LA's action of settlement of its suit with UAW and DLM prior to determination of appeal constituted a waiver of its right to pursue a malpractice action against Turner is a question of law, in a review of

which the appellate court will afford the trial court's decision no deference but will review it for correctness. *See Ong Int'l (U.S.A.), Inc. v. 11th Ave Corp.*, 850 P.2d 447, 452 (Utah 1993)

The issue was preserved below in that it was the primary issue argued in Turner's motion for summary judgment and the trial court specifically found that SHANGRI-LA had forfeited its right to pursue a malpractice action against Turner in the Order Granting Summary Judgment. (R. at 35 -39, 80 -87)

DETERMINATIVE PROVISIONS

1. Rule 69, Utah Rules of Civil Procedure. (Set forth in Addendum 1)
2. Utah Code Ann. § 78-36-3 (1996) (Set forth in Addendum 2)

STATEMENT OF THE CASE AND STATEMENT OF FACTS

1. SHANGRI-LA retained Turner to represent its interest in the matter involved in the sheriff's sale of the apartment complex known as Shangri-la Garden Apartments, ultimately, to UAW and DLM. Turner appeared as counsel on January 28, 1998. SHANGRI-LA had earlier been involved in small claims court actions that ultimately resulted in judgment against SHANGRI-LA for costs and attorney's fees in the amount of $4,767.00. The amount was not paid, the property was set for sheriff's sale and after a botched attempt to pay the amount due prior to sale, was sold for $8,000.00 to Kasey Enterprises, Inc, on August 27, 1996. UAW and DLM purchased the; interest of Kasey Enterprises, Inc. for $11,000.00.

SHANGRI-LA did not redeem the property within the 6 month redemption period set forth in Rule 69, Utah Rules of Civil Procedure. UAW and DLM served a notice to quit on April 16, 1997 and on April 18, 1997, SHANGRI-LA filed an action in Third District Court seeking quiet title to the property and an order setting aside the sheriff's sale or in the alternative, an order extending the time for redemption. UAW and DLM counterclaimed for unlawful detainer and conversion. A two day trial was held on April 13 and 14, 1999.

2. The trial court entered its memorandum decision on May 5, 1998 in which it extended the redemption period, determined that UAW and DLM were entitled to return of their purchase price plus attorney's fees and taxes paid on the property along with rents received on the property from the time of purchase until time of trial, an amount of $304,333.00. The trial court felt that the matter of treble damages had not been sufficiently briefed, and requested the parties to brief the question of treble damages. After receiving said briefs, the trial court imposed a redemption fee including rents of $304,333.00 trebled to the amount of $912,999.00. (See Addendum 3)

3. Turner filed a brief in response to the trial courts request therefore, in which he for the first time, argued that the provisions of the unlawful detainer act did not apply. He did not argue the redemption fee limitations of Rule 69(j), Utah Rules of Civil Procedure would limit the amount of redemption fee that could be legitimately imposed. (See Addendum 4)

4. SHANGRI-LA timely filed its notice of appeal in the matter on November, 17, 1998. The appeal progressed to the point of appellant filing its brief on appeal and appellee filing its brief on appeal, having been completed on or about March 24, 2000. (See Addendum 5)

5. During the time UAW and DLM had possession of the property, the property was neglected and by reason of lax screening, the quality of tenants declined leading to more frequent non-payment of rents. There was a fire in one of the apartment buildings, resulting in substantial damage, which was repaired only to the extent of closing holes in the roof to keep water out, the property was not repaired to the state of being habitable for new tenants. Money from the coin operated machines on the premises was collected but not used to pay obligations, resulting in liens being filed against the property. Proper maintenance was not being done. Damage was not timely repaired. All of the foregoing, resulted in diminution of value of the property. (Affidavit of Stanley Wade Addendum 6)

6. By reason of the aforestated problems, SHANGRI-LA made a business decision to settle the matter with UAW and DLM in order to be able to re-take possession of the property and to be able to resolve the problems outlined above and reverse the ongoing diminution in value of the property attributable to the flawed management of said property. The matter was settled on or about October 6, 2000 by a settlement agreement that provided, inter alia for the dismissal with prejudice of the appeal. On October 6, 2000, the Utah Supreme Court granted a voluntary

dismissal of appeal with prejudice, based on the stipulation of the parties therefore. (See Addendum 6)

SUMMARY OF ARGUMENT

The trial court found there were no contested issues of fact in this matter, allowing it to rule as a matter of law that there was no malpractice committed by Turner. Prior to and at trial, Turner did not bring to the court's attention, the provisions of Rule 69 (j) Utah Rules of Civil Procedure, which rule states with specificity in subparagraphs (3) and (7) what cost items shall be assessed in calculating a redemption fee and how any rents are to be treated. Neither did he bring to the court's attention and argue in an effective and timely manner the language of the unlawful detainer statute that limits the application of such statute to ***tenant and landlord*** disputes. The dispute involved in that matter was a title dispute, which was not brought to the court's attention. An attorney's conduct with regard to whether or not he meets the required standard of care, is a question of fact. It is the duty of a competent attorney to bring pertinent and relevant law to the courts attention. Failure to do so is malpractice. Turner's failure to meet the required standard of care was the proximate cause of SHANGRI-LA's being assessed a redemption fee of nearly one million dollars and being placed in the position of having to settle with UAW and DLM, to mitigate its damages, and to its detriment. Proximate cause is a question of fact. The lower court's finding that SHANGRI-LA had forfeited its right to pursue a malpractice action against Turner when it settled the matter before determination of the appeal taken fro Judge Noel's ruling was error. Where its counsel's deficient conduct

places a party in the position of having to settle a matter before final determination of an appeal, to minimize its losses, that party is not compelled to forgo its right to seek redress for malpractice.

ARGUMENT

1. THE TRIAL COURT ERRED IN FINDING THERE WERE NO CONTESTED ISSUES OF FACT RELATING TO THE QUESTION OF ATTORNEY MALPRACTICE.

An attorney has a duty to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. *Williams b. Barber,* 765 P.2d 887, 889 (Utah 1988) (quoting *Lucase v. Hamm,* 56 Cal2d 583, 15 Car.Rptr. 821, 825, 364 P.2d 685, 689 (1961) *cert. denied, 368* U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962) In the underlying case, there were two critical issues raised by the pleadings. First, SHANGRI-LA raised, inter alia, the issue of equitable redemption of the property. Redemption is governed by Rule 69 (j), Utah Rules of Civil Procedure. Subparagraph (1), (2), (4), (5) and(6) set forth who may redeem, how redemption is made, subsequent redemptions, notice of redemption and certificate of redemption or conveyance. As regards this case, the two critical provisions relating to redemptions are subparagraphs (3) and (7). Subparagraph (3), in pertinent part states:

> **(3) Time for redemption; amount to be paid.** The property may be redeemed . . . . .by paying the amount of the purchase with a surcharge of 6 percent thereon in addition, together with the amount of any assessment or taxes, and any

> reasonable sum for fire insurance and necessary maintenance, upkeep or repair of any improvements upon the property which the purchaser may have paid thereon after the purchase, with interest at the lawful rate on such other amounts, . . .

Subparagraph (7) says, in pertinent part

> **(7) Rents during period of redemption.** The purchaser from the time of sale until a redemption, and a redemptioner from the time of redemption until another redemption, is entitled to receive from any tenant in possession the rents of the property sold or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid . . .

The above provisions therefore then state that in a redemption situation, such as the one at bar, the amount to be paid by the redemptioner, should have been the amount paid by the purchaser at purchase of the property, in this case, $11,000.00 plus 6 percent, plus any amount paid for taxes by the purchaser, plus any amount paid for fire insurance and necessary maintenance, upkeep, or repair of any improvement on the property, plus interest at the lawful rate on any amount paid for the last five items. (The record is silent as to whether UAW and DLM paid any amount other than the purchase price of $11,000.00) A redemption fee calculated according to the requirements of the rule, would have been less than $20,000.00 - far shy of the nearly one million dollars imposed by the court. Any rents involved should have only been used to pay the appropriate redemption fee, any excess to go to the property owner, or redemptioner. The trial court was never presented with the application and language of Rule 69 (j) by SHANGRI-LA's counsel. If the provisions of said rule had been presented in a timely manner at trial, it is difficult to see how the trial court could have ignored the rule's provisions to reach the ruling it did.

It is elemental that a lawyer, using such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise is or becomes aware of provisions of the law that so obviously apply to his case. SHANGRI-LA as part of its suit was seeking the right to redeem the property. One seeking redemption as a remedy should certainly know and argue the law that governs such remedy. This omission was clearly a breach of the required standard of care. " . . . whether a defendant has breached the required standard of care is a question of fact for the jury." *Harline v. Barker* 854 P.2d 595, 599 (Utah App. 1993)

The second issue of importance relates to the claim by UAW and DLM, to be entitled to relief for unlawful detainer, Utah Code Ann. 1996, § 78-36-3. **Unlawful detainer *by tenant* for term less than life.** (Emphasis added) The language of the statute states in its first paragraph: "(1) A **tenant** of real property, for a term less than life, is guilty of an unlawful detainer: . . ." (Emphasis added) The statute clearly on its face applies only to landlord - tenant disputes. The cases annotated under the statute clearly apply only to 'tenants'. The dispute between UAW and DLM and SHANGRI-LA was a dispute over ***TITLE*** to real property, not a dispute over tenancy. The application of the statute was not contested by SHANGRI-LA's counsel until after the court had made its decision wherein it granted UAW and DLM damage relief under the statute. (See the trial courts memorandum decision, Addendum 3) The court only wanted additional briefing from the parties on whether to treble such damages or not. The court obviously had

decided to bestow on UAW and DLM the benefit of the unlawful detainer statute. This too, constitutes a breach of the standard of care and is a question of fact for the jury to decide.

2. Turner's conduct constituted malpractice, and such malpractice was the proximate cause of SHANGRI-LA being burdened with a redemption fee of nearly one million dollars, losing possession of the apartment complex and being placed in the position of being forced to mitigate its damages by settling, to its detriment, with UAW and DLM. Causation is a question of fact for the jury to decide.

SHANGRI-LA has alleged itself to have been damaged by Turner's failure to meet the required standard of care of an attorney, thus raising the issue of causation. If Turner had brought the law with regard to the redemption fee and the law regarding unlawful detainer to the courts attention in a timely manner, the court would have knowingly had to rule contrary to the law to rule as it did. Turner did not do so, and the court's ruling was extremely prejudicial to SHANGRI-LA. Turner's failure to meet the standard of care caused the detriment to SHANGRI-LA. "Proximate cause is an issue of fact. . .Thus, only if there is no evidence upon which a reasonable jury could infer causation, is summary judgment appropriate. *Swift Stop, Inc. v. Wight 845 P.2d 250, 253 (Utah App. 1992)* "The client must show that if the attorney had adhered to the ordinary standards of professional competence and had done the act he failed to do or not done the act complained about, the client would have benefited." *Young v. Bridwell,* 20 Utah 2d 332, 437 P.2d 686, 690 (1968) Again, such a showing relies on the facts, the facts regarding the issue are contested and therefore not appropriate for summary disposition.

3. Under the facts of this case, it was error for the trial court to find that SHANGRI-LA had forfeited its right to pursue a malpractice action against Turner.

There appear to be no Utah cases that address this issue. However, there are cases from other jurisdictions which have considered the question of when and how a party can forfeit a right to pursue counsel for malpractice. Turner, in his motion to the trial court and addressing the situation where a parties counsel had acted in such a manner as to give the party a claim to having been damaged by malpractice, cited *Legal Malpractice §21.16 (5th Ed. 2000), Mallen and Smith* in its statement: "if the compromise prevented the judicial resolution of issues that would have established that the attorney was not negligent or a cause of the client's loss, then the attorney should not be liable." They went on to cite two Florida cases, *Segal v. Segall, 632 So.2d 76 (Fla. Ct. App. 1993) and Pennsylvania Insurance Guaranty Association v. Sikes, 590 So.2d 1051 (Fla. Ct. App. 1991)* as precedent Both *Sikes* and *Segal* involved fact situations in which the attorneys who were sued for malpractice, committed no negligence in their conduct at trial, yet the courts rulings were adverse to their client's interests. In each case, there was a substantial question of judicial error, which was not caused by the attorney's conduct. In each case, the clients appealed the result and then settled the cases before the appeals were heard and then sued their respective attorneys for malpractice. Their settlement of the cases before ruling on the appeals thereby prevented the appellate court from reversing the trial court's error, and vindicating their attorneys actions at trial. The appellate courts in the malpractice actions ruled in both cases that by settling the underlying cases before

appellate determination, the clients had abandoned or waived their claims against their attorneys. The distinction between the Florida cases and the instant case is that in this matter, there was substantial negligent conduct by Turner which allowed the trial court to decide against SHANGRI-LA on the issues of damage and unlawful detainer. The result being that the trial court ruled, in error, that the Wrongful Detainer Act applied to the underlying case and to err in failing to applythe provisions of Rule 69 (j) (3) and (7), provisions of which limit the cost items to be included in the redemption fee and specify how rents are to be treated if they were included in the scenario. Of interest is the Court's final comment in *Segal,:* "We are unable to establish a bright-line rule that complete appellate review of the underlying litigation is a condition precedent to every legal malpractice action. To do so would, in many cases, violate the tenet that the law will not require the performance of useless acts."

UAW and DLM claimed relief under the Wrongful Detainer Act and asked for an award of compensation that was not provided for in Rule 69 (j) (3) and (7) early on in their case and Turner did not object to the claim for relief under wrongful detainer until after the trial court entered its memorandum decision, and never did argue the limitations of Rule 69 At final argument, the following dialogue took place:

The Court: (Addressing Mr. Turner) - - -let me ask you this question. Even if I were to allow you to redeem, if I were to accept your equitable redemption argument, defendant's claim that they're still entitled to rents of $304,000 since the unlawful detainer. What is your response

to that?

Mr. Turner: Our answer would be, your Honor, that they would be entitled to rents from the period they filed the unlawful detainer until such time as this action was brought. (R. at 98)

Mr. Turner did not dispute the claim of UAW and DLM to the rents, treble damages, and attorney's fees, until after the case had been tried, the parties had given their final argument and rested.

Turner has cited the case of *Sutherland v. Milstein, 266 A.D.2d 33, 608 N.Y.S.2.d 15; (1999 N.Y. App. Div)* which case involved a fact situation in which defendant attorneys represented plaintiffs in a medical malpractice action which was settled. The plaintiffs sued their attorneys for malpractice. The appellate court dismissed the appeal finding that the adult plaintiff's claim was time barred and the second plaintiff's claim survived by reason of infancy toll but was properly dismissed because the adult plaintiff controlled the settlement. The court noted that plaintiff did not allege their attorney's negligence forced them to settle. In the instant case, the defendant's negligence did force plaintiff to settle with UAW and DLM to avoid ongoing and accelerating damage. Likewise, the case of *Cozza v. Steuer 694 N.E.2d 1376 (Ohio App. 8 Dist 1997)* is cited as authority to preclude suit where the underlying case is settled prior to determination on appeal. The facts are somewhat complicated, but basically involve an employer hiring attorneys to resist an age discrimination suit by an employee. The employee prevailed,

the employer appealed, settled before the appeal was heard and sued its attorneys for malpractice. The *Steuer* court dismissed the legal malpractice action but in doing so stated:

> We do not suggest that a settlement of the underlying action always operates as a waiver of a client's malpractice claim against his attorney. A settlement entered into as a result of an attorney's exercise of reasonable judgment in handling a case bars a malpractice claim against the attorney. *DePugh v. Sladjoe (1996) 111 Ohio App.3d 675, 676 N.E.2d 1231.* **However, a legal malpractice claim is not barred when the attorney has acted unreasonably or has committed malpractice *per se.*** *Id* **"[W]hen an attorney has made an obvious error which seriously compromises his client's claim, and a settlement is on the table * * * the client should not be forced to forgo the settlement offer as a condition of pursuing the attorney for malpractice.** (Emphasis added) *Id.* See, also, *Monastra v. D'Amore (1996) 111 Ohio App.3d 296, 676 N.E.2d 132* (where attorney's defective representation diminishes client's ability to reach a successful settlement or to succeed at trial, the settlement of the action should not imply a waiver of client's right to file legal malpractice action against the attorney).

Mr. Turner's failure to contest critical issues prior to and at trial created the scenario that placed Plaintiffs in a no-win situation.

For a plaintiff to prevail in a legal malpractice action, it must prove five elements: "(i) the existence of an attorney-client relationship; (ii) a duty of the attorney to the client arising from their relationship; (iii) a breach of that duty; (iv) a causal connection between the breach of the duty and the resulting injury to the client; and (v) actual damages." *Harline v. Barker 912 P.2d 433, 439 (Utah 1996),* as cited in *Glencore, LTD. v. Ince 972 P.2d 376 (Utah 1998).* The *Ince* Court goes on to note that a malpractice action presents a "case within a case". The objective is to establish what the result [of the underlying litigation] *should have been,* (an objective standard), not what a particular

judge or jury *would have decided* (a subjective standard.) The court takes this language, (paraphrased, above) from 2 Ronald E. Mallen & Jeffery M. Smith, *legal malpractice §27.7 at 641-42 (3d ed.1989)* SHANGRI-LA asserts the position that in light of the above statement of law, it is also appropriate to establish what the result of underlying litigation *should have been* and not what the trial judge erroneously *did decide*. (i.) There can be no doubt that there was an attorney-client relationship between Plaintiff's and Defendants. (ii.) From the attorney-client relationship arise several duties, one of which is set forth in Rule 1.1 of the Utah Rules of Professional Conduct which requires: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." (iii.) The demonstrated unfamiliarity with and failure to timely raise the inapplicability of the Unlawful Detainer Statute and the appropriate provisions of Rule 69 (j) (3) and (7) constitute a breach of the afore stated duty and suggest that the Defendants were negligent in failing to undertake reasonable legal research about the issue. (iv.) The breach of that duty placed the SHANGRI-LA in a no-win situation where IT was forced either endure the ongoing damage and diminution in value to the apartment complex under the despotic stewardship of UAW and DLM until their appeal was heard and decided, which could have been two or more years down the road, or to settle the matter with UAW and DLM to cut off the damage and diminution in value to the property. (v.)The Plaintiffs were damaged by having to pay $100,000 to UAW and DLM, abandon the fire insurance proceeds, loose the rent paid to UAW and DLM, and to accept the

return of severely damaged apartments that required much repair.

The case of *Watkis & Saperstein v. Williams 931 P.2d 840 (Utah 1996)* is applicable. That case involved allegations of negligence where Watkiss & Saperstein were alleged to have committed negligence in a case where they missed a statute of limitations. However, the law in the District of Columbia was unsettled and uncertain as it regarded the event tolling a statute of limitations in their particular situation. Watkiss & Saperstein chose the wrong date as determined by an appellate court decision handed down after the fact resulting in their client being out of court on the issue. In ruling on their case in the malpractice action brought as a result thereof, the Utah Supreme Court noted, inter alia, that "To qualify for immunity from liability for the consequences of an erroneous legal interpretation of unsettled and uncertain law, most courts demand that lawyers perform the research and investigation necessary to make an informed judgment. *See, e.g., Smith v. Lewis 13Cal.3d 349, 118 Cal.Rptr 621, 530 P.2d 589 (1975).* This is so the lawyer will follow the best and most logical interpretation out of a number of reasonable interpretations. *See Mallen & Smith* § 17.6 at 507-08, § 17.17, at 543." Noting that a lawyer is not required to anticipate changes in the law, the Supreme Court affirmed the trial courts dismissal of the action against Watkiss & Saperstein. The whole point of citing this case and the holdings thereof, is to highlight the obligation of counsel to know the law involved in the issues of a case he undertakes, and if he does not know the law, then he is obligated to learn the law, and to do so before trial on the matter. Otherwise he does not fulfill his duty of competent representation to the client he represents.

Once an attorney-client relationship is established, the attorney's duty is to "'use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of tasks which they undertake.'" *Williams v. Barber, 765 P.2d 887, 889 (Utah 1988).* The Williams Court also states that ". . . counsel is required to undertake the research which a reasonable attorney under the circumstances would do. *Id. Accord Williams, 765 P.2d at 889.* " Ordinarily, whether a defendant has breached the required standards of care is a question of fact for the jury. Consequently, a motion for summary judgment should be denied where the evidence presents a genuine issue of material fact which, if resolved in favor of the non-moving party, would entitle him to a judgment as a matter of law. A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ on whether defendant's conduct measures up to the required standard." *Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982).*

CONCLUSION

Turner owed a duty to the client to not undertake representation regarding an area of the law in which he did not have the such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of tasks which they undertake. *Lucas v. Hamm 56 Cal.2d 583, 15 Cal.Rptr. 821, 825, 364 P.2d 685, 689 (1961) cert. Denied, 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed2d 525 (1962).* It has been recognized that a lawyer may undertake a case involving issues of law in which he is not cognizant or knowledgeable, **if he is able to develop the cognizance or knowledge**

in time to meet his duty to the client. The Defendants failure to be able to meet and deal with the issue of the Wrongful Detainer Statute and the elements of Rule 69 (j) (3) and (7) at trial constitutes a breach of that duty. But for Turner's failure to meet the correct standard of care, SHANGRI-LA would not have been placed in a position where it was forced to settle with UAW and DLM prior to the hearing of its appeal, to mitigate its damages and prevent further damage and diminution of value of the apartment complex. Most of the foregoing issues are questions of fact. The cases cited by Turner which were found to defeat a malpractice claim by the client against his attorney, were cases in which the attorney's conduct was not questionable, but the result was. They did not involve cases in which the attorney missed or failed to address critical issues, which proximately caused the client's injury and damage. There are disputed issues of material fact in this matter that preclude summary judgment and the grant of summary judgment should be reversed.

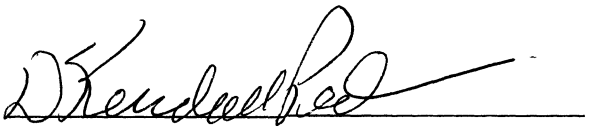
Respectfully submitted this 8 day of Oct, 2004.

D. Kendall Perkins
Attorney for Appellant

CERTIFICATE

I hereby certify that I caused two copies of the foregoing to be hand delivered, this 6 day of Oct, 2004 to:

Michael F. Skolnick
KIPP and CHRISTIAN P.C.
10 Exchange Place, 4th Floor
Salt Lake City, Utah 84111



Tab 1

Rule 69. Execution and proceedings supplemental thereto.

(a) **Availability of writ of execution.** A writ of execution is available to a judgment creditor to satisfy a judgment or other order requiring the delivery of property or the payment of money by a judgment debtor.

(b) **Property subject to execution.** A writ of execution may be used to levy upon all of the judgment debtor's personal property and real property which is not exempt from execution under state or federal law.

(c) **Issuance of writ of execution.** Unless otherwise ordered by the court, a writ of execution may be issued at any time within eight years following the entry of a judgment or order (except an execution may be stayed pursuant to Rule 62), either in the county in which such judgment was rendered, or in any county in which a transcript thereof has been filed and docketed in the office of the clerk of the district court. Notwithstanding the death of a party after judgment, execution thereon may be issued, or such judgment may be enforced, as follows:

(1) In case of the death of the judgment creditor, upon the application of an authorized executor or administrator, or successor in interest.

(2) In case of the death of the judgment debtor, if the judgment is for the recovery of real or personal property or the enforcement of a lien thereon.

(d) **Contents of writ and to whom it may be directed.** The writ of execution shall be issued in the name of the State of Utah, and subscribed by the clerk of the court. It shall be issued to the sheriff or constable of any county in the state (and may be issued at the same time to different counties) but where it requires the delivery of possession or sale of real property, it shall be issued to the sheriff of the county where the real property or some part thereof is situated. If it requires delivery of possession or sale of personal property, it may be issued to a constable. It must intelligibly refer to the judgment, stating the court, the docket number, the county where the same is entered or docketed, the names of the parties, the judgment, and, if it is for the payment of money, the amount thereof, and the amount actually due thereon. The writ may be accompanied by a praecipe executed by the judgment creditor or the judgment creditor's counsel generally or specifically describing the real or personal property to be levied upon. It shall be directed to the sheriff of the county in which it is to be executed in cases involving real property, and shall require the officer to proceed in accordance with the terms of the writ; provided that if such writ is against the property of the judgment debtor generally it may direct the sheriff or constable to satisfy the judgment, with interest, out of the non-exempt personal property of the debtor, and if sufficient non-exempt personal property cannot be found, then the sheriff shall satisfy the judgment, with interest, out of the judgment debtor's non-exempt real property.

(e) **When writ to be returned.** The writ of execution shall be served at any time within sixty days after its receipt by the officer. It shall then be returned to the court from which it issued, and when it is returned the clerk must attach it to the record.

(f) **Service of the writ.** Unless the execution otherwise directs, the officer must execute the writ against the non-exempt property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient property; collecting or selling the choses in action and selling the other property in the manner set forth herein. Levy includes the seizure of the property and holding the property in person or through one or more agents, including the judgment debtor, appointed by the officer. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within view of the officer, the officer must levy only on such part of the property as the judgment debtor may indicate, if the property indicated is amply sufficient to satisfy the judgment and costs.

When an officer has served an execution issued out of any court the officer may complete the return thereof after such date of service.

(g) **Notice to judgment debtor of sale and of exempt property and right to a hearing.** At the time the writ of execution is issued, the clerk shall attach to the writ a notice of execution and exemptions and right to a hearing and two copies of an application by which the judgment debtor may request a hearing.

Upon service of the writ, the sheriff or constable shall serve upon the judgment debtor, in the same manner as service of a summons in a civil action, or cause to be transmitted by both regular and certified mail, returned receipt requested, to the judgment debtor's last known address as provided by the judgment creditor, (i) the notice of execution and exemptions and right to a hearing, and (ii) the application by which the judgment debtor may request a hearing. Upon service of the writ, the sheriff or constable may also set the date of sale or delivery and serve upon the judgment debtor notice of the date and time of sale or delivery in the same manner as service of the notice of execution and exemptions and right to a hearing.

The notice of execution and exemptions that is to be served upon the judgment debtor shall indicate in substance that certain property is or may be exempt from execution including but not limited to a homestead; tools of the trade; a motor vehicle used for the judgment debtor's business or profession; social security benefits; supplemental security income benefits; veterans' benefits; unemployment benefits; workers' compensation benefits; public assistance (welfare); alimony; child support; certain pensions; part or all of wages or other earnings from personal services; certain furnishings and appliances; musical instruments; and heirlooms (each not to exceed the amount allowed by law). The notice shall also indicate that the list is a partial list and other various property exemptions may be available under federal law or the Utah exemptions statute, and that the judgment debtor must request a hearing within ten (10) days from the date of service of the notice upon the judgment debtor. For purposes of this provision, the date of service shall be the date of mailing, if mailed, or date of delivery, if hand-delivered, and no period for mailing under Rule 6(e) shall be used in computing the time period.

If the writ, the notice of execution and exemptions and right to a hearing cannot be served upon the judgment debtor in the same manner as service of a summons in a civil action, and the judgment creditor does not have available the judgment debtor's last known address, only the following notice need be published under the caption of the case in a newspaper of general circulation in each county in which the property levied upon, or some part thereof, is situated:

> TO _____, Judgment Debtor:
>
> A writ of execution has been issued in the above-captioned case, directed to the sheriff or constable of _____ County, commanding the sheriff or constable as follows:
>
> "WHEREAS, _____ [Quoting body of writ of execution]."
>
> YOU MAY HAVE A RIGHT TO EXEMPT PROPERTY from the sale under statutes of the United States or this state, including Utah Code Annotated, Title 78, Chapter 23, in the manner described in those statutes.

The date of publication shall be deemed the date of service and the date of publication shall be not less than ten (10) days prior to the date of sale or delivery.

This paragraph (g) shall not be applicable to judicial mortgage foreclosure proceedings commenced under Utah Code Annotated, Title 78, Chapter 37.

(h) **Request for hearing.**

(1) Time for request. The judgment debtor or any other person who

owns or claims an interest in the property subject to execution may request a hearing to claim any exemption to the execution, or to challenge the issuance of the writ. Such request must be filed or served upon the judgment creditor or the attorney for the judgment creditor within ten (10) days of the service upon the judgment debtor of the materials required to be served by paragraph (g) upon the judgment debtor. The request for a hearing, which shall be provided to the judgment debtor shall be in a form to enable the judgment debtor to specify the grounds upon which the judgment debtor challenges the issuance of the writ or claims the property executed upon to be exempt, in whole or in part.

(2) **If a request for hearing is filed.** If a request for hearing is filed by or on behalf of the judgment debtor, the court shall set the matter for hearing within ten (10) days from the filing of the request and serve notice of that hearing upon all parties by first class mail. If the court determines at the hearing that the writ was issued improperly, or that any property seized is exempt from or is not subject to execution, the court shall immediately issue an order to the officer releasing such property or portion thereof from the writ of execution. If the court finds that the property or a portion thereof is subject to execution and not exempt, it shall issue an order directing the officer to proceed with the sale of the non-exempt property subject to execution. If the originally scheduled date of sale for which notice has been given has passed, notice of the new date and time of sale shall be provided as required herein. No sale may be held until the Court has decided upon the issues presented at the hearing. At the hearing, the court may award costs as it deems appropriate.

(3) **If no request for hearing is filed.** If a request for hearing is not filed as provided for in this Rule and the time for doing so has expired, then the officer shall proceed to sell or deliver the property subject to execution in accordance with the writ and this Rule 69.

(4) This paragraph (h) shall not be applicable to judicial mortgage foreclosure proceedings commenced under Utah Code Annotated, Title 78, Chapter 37.

(i) **Proceedings on sale of property.**

(1) **Notice of sale.** Before the sale of the property on execution notice thereof must be given as follows: (A) in case of perishable property or animals, by posting written notice of the time and place of sale, and generally describing the property to be sold, in the district courthouse and in at least three other public places of the county or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property; (B) in case of other personal property, by posting written notice of the time and place of sale, and generally describing the property to be sold, in the district courthouse and in at least three public places of the county or city where the sale is to take place, for not less than seven nor more than 14 days, and by publishing a copy thereof at least one time not less than one day preceding the sale in some newspaper of general circulation published or circulated in the county where the sale is to take place, if there is one; (C) in case of real property, by posting written notice of the time and place of sale, and particularly describing the property, for 21 days, on the property to be sold, at the place of sale, at the district courthouse of the county where the real property to be sold is situated, and in at least three public places of the county or city where the sale is to take place, and by publishing a copy thereof at least 3 times, once a week for 3 successive weeks immediately preceding the sale, in some newspaper of general circulation published or circulated in the county, if there is one. In addition, except for the sale of perishable property or animals, if notice of the date and time of sale has not been served upon the judgment debtor previously, notice of the date

and time of sale shall be served upon the judgment debtor personally or by causing the same to be transmitted by regular or certified mail to the judgment debtor's last known address.

(2) **Postponement.** If at the time and place appointed for the sale of any real or personal property on execution the officer shall deem it expedient and for the interest of all persons concerned to postpone the sale for want of purchasers, or other sufficient cause, the officer may postpone the same from time to time, until the same shall be completed; and in every such case the officer shall make public declaration thereof at the time and place previously appointed for the sale, and if such postponement is for a longer time than 72 hours, notice thereof shall be given in the same manner as the original notice of such sale is required to be given.

(3) **Conduct of sale.** All sales of property under execution must be made at auction to the highest bidder, Monday through Saturday, legal holidays excluded, between the hours of 9 o'clock a.m. and 8 o'clock p.m. After sufficient property has been sold to satisfy the execution no more shall be sold. Neither the officer holding the execution nor such officer's deputy shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery it must be within view of those who attend the sale. The sale must be held in a place reasonably accessible to the general public. The property must be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and the third person requires it to be sold separately, such portion must be thus sold. All sales of real property must be made at the courthouse of the county in which the property, or some part thereof, is situated. The judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the officer must follow such directions. The officer shall pay to the judgment creditor or the attorney for the judgment creditor so much of the sales proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and reasonable accrued costs must be returned to the judgment debtor, unless otherwise directed by the judgment or the court.

(4) **Accounting of sale.** Upon request of the judgment debtor or the judgment debtor's attorney, the plaintiff shall deliver an accounting of any execution sale, including the amount due on the judgment, accrued costs, and the amount realized at the sale.

(5) **Purchaser refusing to pay.** Every bid shall be deemed an irrevocable offer; and if the purchaser refuses to pay the amount bid for the property struck off to such purchaser at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby, the party refusing to pay, in addition to being liable on such bid, is guilty of a contempt of court and may be punished accordingly. When a purchaser refuses to pay, the officer may also, in such officer's discretion, thereafter reject any other bid of such person.

(6) **Personal property.** When the purchaser of any personal property pays the purchase money, the officer making the sale shall deliver the property to the purchaser (if such property is capable of manual delivery) and shall execute and deliver to the purchaser a certificate of sale and payment. Such certificate shall state that all right, title and interest which the debtor had in and to such property on the day the execution or attachment was levied, and any right, title and interest since acquired, is transferred to the purchaser.

(7) **Real property.** Upon a sale of real property the officer shall give to the purchaser a certificate of sale, containing: (A) a particular descrip-

tion of the real property sold; (B) the price paid by the purchaser for each lot or parcel if sold separately; (C) the whole price paid; (D) a statement to the effect that all right, title, interest and claim of the judgment debtor in and to the property is conveyed to the purchaser; provided that where such sale is subject to redemption that fact shall be stated also. A duplicate of such certificate shall be filed for record by the officer in the office of the recorder of the county. The real property sold shall be subject to redemption, except where the estate sold is less than a leasehold of a two-years' unexpired term, in which event said sale is absolute.

(j) **Redemption of real property from sale.**

(1) **Who may redeem.** Real property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their successors in interest: (A) the judgment debtor; (B) a creditor having a lien by judgment, mortgage, or other lien on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

(2) **Redemption; how made.** The person seeking redemption may make payment of the amount required to the person from whom the property is being redeemed, or for such person to the officer who made the sale, or such officer's successor in office. At the same time the redemptioner must produce to the officer or person from whom the redemptioner seeks to redeem, and serve with the notice to the officer; (A) a certified copy of the judgment under which the redemptioner claims the right to redeem, or, if the redemptioner redeems upon a mortgage or other lien, a copy certified by the recorder; (B) an assignment, properly acknowledged or proved where the same is necessary to establish the claim; (C) an affidavit by the redemptioner or an authorized agent showing the amount then actually due on the judgment, mortgage or other lien.

(3) **Time for redemption; amount to be paid.** The property may be redeemed within six months after the sale by paying the amount of the purchase with a surcharge of 6 percent thereon in addition, together with the amount of any assessment or taxes, and any reasonable sum for fire insurance and necessary maintenance, upkeep, or repair of any improvements upon the property,which the purchaser may have paid thereon after the purchase, with interest at the lawful rate on such other amounts, and, if the purchaser is also a creditor having a lien prior to that of the person seeking redemption, other than the judgment under which said purchase was made, the amount of such other lien, with interest.

In the event there is a disagreement as to whether any sum demanded for redemption is reasonable or proper, the person seeking redemption may pay the amount necessary for redemption, less the amount in dispute, to the court out of which execution or order authorizing the sale was issued, and at the same time file with the court and serve upon the purchaser a petition setting forth the item or items demanded to which the redemptioner objects, together with the grounds of objection; and thereupon the court shall enter an order fixing a time for hearing of such objections. A copy of the order fixing time for hearing shall be served on the purchaser not less than five days before the day of hearing. Upon the hearing of the petition the court shall enter an order determining the amount required for redemption. In the event an additional amount to that theretofore paid to the clerk is required, the person seeking redemption shall pay to the clerk such additional amount within 7 days. The purchaser shall forthwith execute and deliver a proper certificate of redemption upon being paid the amount required by the court for redemption.

(4) **Subsequent redemptions.** If the property is redeemed by a creditor, any other creditor having a right of redemption may, within 60 days after the last redemption and within six months after the sale, redeem the

property from such last redemptioner in the same manner as provided in the preceding paragraph, upon paying the sum of such last redemption, with a surcharge of three percent thereon in addition, and the amount of any assessment or tax, and any reasonable sum for fire insurance and necessary maintenance, upkeep or repair of any improvements upon the property which the last redemptioner may have paid thereon, with interest on such amount, and, in addition, the amount of any lien held by such last redemptioner prior to the redemptioner's own, with interest.

(5) **Notice of redemption.** Written notice of any redemption shall be given to the officer and a duplicate filed with the recorder of the county. Similar notice shall be given of any taxes or assessments or any sums for fire insurance, and necessary maintenance, upkeep or repair of any improvements upon the property, paid by the person redeeming, or the amount of any lien acquired, other than upon which the redemption was made. Failure to file such notice shall relieve any subsequent redemptioner of the obligation to pay such taxes, assessments, or other liens.

(6) **Certificate of redemption or conveyance.** If no redemption is made within six months after the sale, the purchaser or the purchaser's assignee is entitled to a conveyance; or if so redeemed, whenever 60 days have elapsed and no other redemption by a creditor has been made and notice thereof has been given, the last redemptioner, or assignee, is entitled to a sheriff's deed at the expiration of six months after the sale. If the judgment debtor redeems, the judgment debtor must make the same payments as are required to effect a redemption by a creditor. If the debtor redeems, the effect of the sale is terminated and the debtor is restored to the debtor's estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to the debtor a certificate of redemption, duly acknowledged. Such certificate must be filed and recorded in the office of the county recorder where the property is situated.

(7) **Rents during period of redemption.** The purchaser from the time of sale until a redemption, and a redemptioner from the time of redemption until another redemption, is entitled to receive from any tenant in possession the rents of the property sold or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or their assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or such purchaser's assigns to such redemptioner or debtor. If such purchaser or such purchaser's assigns shall for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may, within 60 days after such demand, bring an action to compel an accounting and disclosure of such rents and profits, and until 15 days from and after the final determination of such action the right of redemption is extended to such redemptioner or debtor.

(k) **Remedies of purchaser.**

(1) **For waste.** Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, upon motion, with or without notice, of the purchaser, or such purchaser's successor in interest. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of

husbandry, or to make the necessary repairs or buildings thereon or to use wood or timber on the property therefor, or for the repair of fences, or for fuel for a family while such person occupies the property. After the estate has become absolute, the purchaser or a successor in interest may maintain an action to recover damages for injury to the property by the tenant or other person in possession after sale and before possession is delivered under the conveyance.

(2) **Where purchaser fails to obtain possession of property or is dispossessed thereof or evicted therefrom.** Where, because of irregularities in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, or because of the reversal or discharge of the judgment, a purchaser of property sold on execution, or a successor in interest, fails to obtain the property or is dispossessed thereof or evicted therefrom, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment creditor as the court may prescribe, enter judgment against such judgment creditor for the price paid by the purchaser, together with interest. In the alternative, if such purchaser or a successor in interest, fails to recover possession of any property or is dispossessed thereof or evicted therefrom in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment debtor as the court may prescribe, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived shall have the same force and effect as would an original judgment of the date of the revival.

(l) **Contribution and reimbursement; how enforced.** When upon an execution against several persons more than a pro rata part of the judgment is satisfied out of the proceeds of the sale of the property of one, or one of them pays, without a sale, more than such person's proportion, and the right of contribution exists, such person may compel such contribution from the others; and where a judgment against several is upon an obligation of one or more as security for the others, and the surety has paid the amount or any part thereof, by sale of property or otherwise, the surety may require reimbursement from the principal. The person entitled to contribution or reimbursement shall, within one month after payment, or sale of the property in the event there is a sale, file in the court where the judgment was rendered a notice of such payment and the claim for contribution or reimbursement. Upon the filing of such notice the clerk must make an entry thereof in the margin of the docket which shall have the effect of a judgment against the other judgment debtors to the extent of their liability for contribution or reimbursement.

(m) **Payment of judgment by person indebted to judgment debtor.** After the issuance of an execution and before its return, any person indebted to the judgment debtor may pay to the officer the amount of the debt, or so much thereof as may be necessary to satisfy the execution, and the officer's receipt is a sufficient discharge for the amount paid.

(n) **Where property is claimed by third person.** If an officer shall proceed to levy any execution on any goods or chattels claimed by any person other than the defendant, or should the officer be requested by the judgment creditor so to do, such officer may require the judgment creditor to give an undertaking, with good and sufficient sureties, to pay all costs and damages that the officer may sustain by reason of the detention or sale of such property; and until such undertaking is given, the officer may refuse to proceed against such property.

(o) **Order for appearance of judgment debtor; arrest.** At any time when execution may issue on a judgment, the court from which an execution might issue shall, upon written motion of the judgment creditor, with or without notice as the court may determine, issue an order requiring the judgment debtor, or if a corporation, any officer thereof, to appear before the court, a master, or other person appointed by the court, at a specified time and place to answer concerning the judgment debtor's property. A judgment debtor, or if a corporation, any officer thereof, may be required to attend outside the county in which such person resides, but the court may make such order as to mileage and expenses as is just. The order may also restrain the judgment debtor from disposing of any nonexempt property pending the hearing. Upon the hearing such proceedings may be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as on execution against such property.

(p) **Examination of debtor of judgment debtor.** At any time when execution may issue on a judgment, upon proof by affidavit or otherwise to the satisfaction of the court that any person or corporation has property of such judgment debtor or is indebted to the judgment debtor in an amount exceeding two hundred fifty dollars, not exempt from execution, the court may order such person or corporation or any officer or agent thereof, to appear before the court or a master at a specified time and place to answer concerning the same. Witness fees and mileage, if any, may be awarded by the court.

(q) **Order prohibiting transfer of property.** If it appears that a person or corporation, alleged to have property of the judgment debtor or to be indebted to the judgment debtor in an amount exceeding fifty dollars, not exempt from execution, claims an interest in the property adverse to such judgment debtor or denies such indebtedness, the court may order such person or corporation to refrain from transferring or otherwise disposing of such interest or debt until such time as may reasonably be necessary for the judgment creditor to bring an action to determine such interest or claim and prosecute the same to judgment. Such order may be modified or vacated by the court at any time upon such terms as may be just.

(r) **Witnesses.** Witnesses may be required to appear and testify in any proceedings brought under this rule in the same manner as upon the trial of an issue.

(s) **Order for property to be applied on judgment.** The court or master may order any property of the judgment debtor, not exempt from execution, in the possession of the judgment debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

(t) **Appointment of receiver.** The court may appoint a receiver of the property of the judgment debtor, not exempt from execution, and may forbid any transfer or other disposition thereof or interference therewith until its further order therein; provided that before any receiver shall be vested with the real property of the judgment debtor a certified copy of the appointment shall be recorded in the office of the recorder of the county in which any real estate sought to be affected thereby is situated.

Advisory Committee Note. — The 1994 amendments constitute a substantial reorganization and revision of the rule applicable to executions. While not an exhaustive list, the Advisory Committee notes the following significant changes:

The Rule has been restructured to eliminate references to gender.

Paragraph (a) specifies that a writ of execution is available only post judgment and Paragraph (b) now states that a writ of execution may only be used to reach the judgment debtor's non-exempt real or personal property. The availability of writs of execution to reach non-exempt property, and the requirement that the judgment creditor now notify the judgment debtor of a right to exemptions, are described in several provisions of the revised rule. This change incorporates similar notice procedures now utilized in Rule 64D, and alleviates constitutional due process problems in the previous rule. These constitutional issues were addressed by the United States Court of Appeals in Aacen v. San Juan County Sheriff's Department, 944 F.2d 691 (10th Cir. 1991), involving a similar New Mexico Rule.

Paragraph (d) retains the requirement that writs of execution be issued to and served by a

sheriff or constable. A sheriff must make service in the case of real property. Paragraph (d) also allows the use of a praecipe, which is commonly executed by the judgment creditor or the judgment creditor's counsel directing the officer to specific property to be levied upon. In practice, some officers will not execute a writ of execution without an accompanying praecipe.

Paragraph (e) has been amended to allow the officer to serve the writ within sixty (60) days, although the return of the writ may be made thereafter.

Paragraph (f) now defines "levy" as the seizure of the non-exempt property and authorizes the officer to hold the property in person or through one or more agents. It is common practice for the officer to appoint a "keeper" to hold the property pending sale as it is not always practical for the officer to take physical possession of the property. Language in this paragraph on payment of the sales proceeds has now been relocated to new Paragraph (i) on conducting the sale. Provisions in paragraph (f) regarding detailed procedures in event of death of the officer were deemed unnecessary and have been eliminated.

Paragraph (g) is new and provides that the clerk shall attach to the writ of execution a notice of execution and exemptions and right to a hearing, and two copies of an application by which the judgment debtor may request a hearing. A similar procedure is contained in Rule 64D. It is expected in practice that the plaintiff will provide to the clerk the materials to be attached to the writ. Official forms for the notice of execution, exemptions and right to a hearing, and the application for a hearing have been prepared by the Committee. Service of these forms may be made personally in the same manner as service of a summons in a civil action or may be transmitted by mail to the judgment debtor's last known address as provided by the judgment creditor. Notice of the time and date of sale may also be served at the same time. Paragraph (g) also contains a publication form of service if the judgment creditor's last known address is not available. This paragraph also sets forth the language to be included in the notice and application to be served upon or mailed to the judgment debtor. Paragraph (g) is not applicable to judicial mortgage foreclosure proceedings since the real property in such an action has already been ordered sold by the court.

Paragraph (h) is new. This paragraph contains a hearing procedure similar to current hearing practice under Rule 64D and contains the time limits applicable to requests for a hearing to contest the writ of execution. This paragraph is not applicable to mortgage foreclosure proceedings.

Paragraph (i)(1) substantially revises the previous provision on notice of sale. In the case of non-perishable personal property, the notice must generally describe the property to be sold, the notice must be posted at the district courthouse and in at least three public places in the county or city where the sale is to take place, and it must be published in a newspaper of general circulation at least one day preceding the sale. In addition, in the event notice of the time and place of sale has not been previously served upon or mailed to the judgment debtor, or if the original sale date was canceled, this Paragraph requires that a copy of the notice of sale be served upon or mailed to the judgment debtor. The former rule simply required posting in three public places. The Committee determined that such notice would not reasonably apprise the judgment debtor or interested third parties of the time and place of sale. Those interested in the sale will also be able to review all notices at a central location, i.e., the district courthouse. Similar changes have been made with respect to notice of sale of real property. The Committee believes that the revisions to this paragraph rectify several constitutional issues raised by the former Rule.

Paragraph (i)(2) expands the time in which the officer may postpone the sale from one day to 72 hours. This coincides with a similar postponement procedure in the Utah Trust Deed Foreclosure statute.

Paragraph (i)(3) clarifies the authorized days for a sale and expands the time allowed from 9:00 o'clock a.m. to 8:00 o'clock p.m., rather than 5:00 o'clock p.m. This was intended by the Committee to expand the time during which the judgment debtor and third parties would be able to attend the sale.

Paragraph (j) clarifies that redemption only pertains to real property and clarifies the procedure and documents required for redemption.

Paragraph (o) pertains to orders in supplemental proceedings and authorizes the court to order the judgment debtor to appear before the court, a master or other person appointed by the court. It is intended by the Committee that this could include the judgment creditor's attorney. The former rule authorizing the judgment debtor to be arrested based upon an affidavit has been eliminated.

Amendment Notes. — The 1994 amendment, effective January 1, 1995, rewrote this rule.

Compiler's Notes. — Subdivision (c) of this rule was originally taken from Rule 69(a), F.R.C.P.

Cross-References. — Contempt, Title 78, Chapter 32.

Contribution among joint tort-feasors, §§ 78-27-39 to 78-27-43.

County recorder, Title 17, Chapter 21.

Duty to answer questions, § 78-24-9.

Entry of a judgment after the death of a party, U.R.C.P. 58A(e).

Execution and levy against decedent or personal representative prohibited, § 75-3-812.

Fee, additional filing fee for cases where execution requested, § 21-1-5.

Notice of execution, Form 31.

Process in behalf of and against persons not parties, U.R.C.P. 71A.

NOTES TO DECISIONS

ANALYSIS

Construction of rule.

The procedures for redemption often confer substantive rights. Generally, therefore, when the procedure at issue affects the substantive rights of the parties, the procedure should be followed strictly in order not to interfere with these rights. Huston v. Lewis, 818 P.2d 531 (Utah 1991).

Contents of writ.

—Reissuance of first writ as second writ.

A clerk may, under circumstances that mandate his issuance of a second writ of execution, reissue the first writ by acknowledging his initial signature thereon and using a seal previously stamped, and by so doing, he has fulfilled the formalities required by Subdivision (b) that the writ be issued in the name of the state of Utah, sealed with the court's seal, and subscribed by the clerk. Heath Tecna Corp. v. Sound Sys. Int'l, 588 P.2d 169 (Utah 1978).

Contribution and reimbursement.

—Co-guarantors of installment debt.

Where plaintiff co-guarantor of installment debt had paid less than half of the outstanding balance due, his action against his co-guarantors for contribution was premature since the right to contribution depends upon performance by one of more than his proportionate share. Gardner v. Bean, 677 P.2d 1116 (Utah 1984).

—Joint owners.

Under this rule there is no authority for distinguishing between the rights of redemption of a judgment lienholder, whose judgment was against only one joint owner, and of a lienholder whose lien covers the entire ownership. Tanner v. Lawler, 6 Utah 2d 268, 311 P.2d 791 (1957).

Where decedent had actively participated in purchase and furnishing of mobile home to be used for the mutual benefit of himself and plaintiff, and he and plaintiff had discussed marriage and in fact had resided in the mobile home together, trial court was justified in concluding that the decedent was the joint purchaser of the home, that there was a benefit given to him at his request, and that consequently he received consideration for becoming a co-obligor on the purchase contract. Winkel v. Call, 603 P.2d 808 (Utah 1979).

Enforcement of judgment.

—Method.

A levy of execution is ordinarily the only proper method to enforce a judgment lien, unless the case involves special circumstances, such that execution does not lie, in which case the procedure for enforcement is an equitable action to foreclose the judgment lien. Belnap v. Blain, 575 P.2d 696 (Utah 1978).

—Right of prevailing party.

Party in whose favor judgment was rendered had a clear right to have it enforced, and if anyone attempted to interfere with that right it was also the clear duty of the court, in case a proper application was made, to enforce the judgment. Ketchum Coal Co. v. Christensen, 48 Utah 214, 159 P. 541 (1916); Ketchum Coal Co. v. District Court, 48 Utah 342, 159 P. 737, 4 A.L.R. 619 (1916).

Interest acquired by purchaser.

—Lien.

Purchaser of horse trailer at sheriff's sale took trailer with constructive notice of vehicle lien on it, notwithstanding slight discrepancies in the description of the trailer on the title cer-

tificate. Basin Loans, Inc. v. Young, 764 P.2d 239 (Utah Ct. App. 1988).

Issuance of writ.

—Partial assignment of judgment.

Partial assignment of a judgment and the execution sale held thereunder were valid where the judgment debtor had not paid any portion of the sizeable judgment against him and had not been subjected to collection efforts by the original judgment creditor; any amounts recovered by the assignee apparently inured to the benefit of the assignor; and there was no claim of prejudice to the judgment debtor resulting from the partial assignment or from the execution sale based on the partial assignment. Gilroy v. Lowe, 626 P.2d 469 (Utah 1981).

—Prerequisites.

Without an initial foreclosure judgment, the clerk has no basis upon which to calculate a deficiency. Thus, the clerk cannot enter a deficiency judgment and absent such a judgment he or she cannot properly issue a writ of execution. Tech-Fluid Servs., Inc. v. Gavilan Operating, Inc., 787 P.2d 1328 (Utah Ct. App.), cert. denied, 795 P.2d 1138 (Utah 1990).

—Stay.

——Bankruptcy.

Failure to assert bankruptcy as a defense is not fatal to a later successful assertion of a discharge that postdates the judgment, so that a stay of execution of the judgment is proper based upon such discharge. Upton v. Heiselt Constr. Co., 3 Utah 2d 170, 280 P.2d 971 (1955).

—Timeliness.

Where the judgment was rendered on October 22, 1971, and the execution sale took place on Monday, October 22, 1979, the execution sale was timely. Gilroy v. Lowe, 626 P.2d 469 (Utah 1981).

——Tolling.

Part payment or written acknowledgment of a judgment does not toll the eight-year limitation period for serving process to enforce a judgment by writ of execution. Yergensen v. Ford, 16 Utah 2d 397, 402 P.2d 696 (1965).

Order for appearance of judgment debtor.

—Issues raised.

——Constitutionality.

Taxpayer who did not appeal a judgment against him for underpayment of income taxes could not raise the issue of the constitutionality of the tax in a supplemental proceeding whose purpose was to determine the location and amount of taxpayer's property for purpose of satisfying the judgment. State Tax Comm. v. Wright, 596 P.2d 634 (Utah 1979).

Proceedings for sale of property.

—Applicability of rule.

Sales of property in partition proceedings should be governed by the statutes governing partition, and not by Subdivision (e). Gillmor v. Gillmor, 657 P.2d 736 (Utah 1982).

—Conduct of sale.

——Separate parcels.

Description in deed of land as "Lots 1 and 2 of block 28, Plat A Manti City Survey" did not serve to separate an otherwise unified parcel into two parcels subject to separate sales under Subdivision (e)(3). Commercial Bank v. Madsen, 120 Utah 519, 236 P.2d 343 (1951).

Certified copy of a certificate of sale contained in a supplemental record was sufficient, on appeal, to support trial court's determination that a parcel of real estate was sold separately where the record contained conflicting evidence on the issue. Bawden & Assocs. v. Smith, 646 P.2d 711 (Utah 1982).

In order for lots or parcels to qualify as "known lots or parcels" within the meaning of Subdivision (e)(3), requiring them to be sold separately, the lots or parcels must be readily identifiable to the sheriff conducting the sale. Beesley v. Hatch, 863 P.2d 1319 (Utah 1993).

——Setting aside.

A sale which has been regularly held and fairly conducted should not be set aside merely because a higher bid is offered later. Commercial Bank v. Madsen, 120 Utah 519, 236 P.2d 343 (1951).

——Time of sale.

Sheriff conducting foreclosure sale may, in his discretion, set such time for sale as he chooses so long as it is within the limit prescribed by this section. Commercial Bank v. Madsen, 120 Utah 519, 236 P.2d 343 (1951).

—Postponement.

——From Saturday or day before holiday.

When a sale which was to be held on a Saturday or the day before a holiday is postponed for one day, such that additional notice is not necessary under Subdivision (e)(2), the postponement is, pursuant to Rule 6(a), until the next business day. Mower v. Bohmke, 9 Utah 2d 52, 337 P.2d 429 (1959).

—Procedural requirements.

The steps specified by Subdivision (e)(1) are necessary to levy on real property, and the execution of a writ is not begun until the officer has begun to perform these steps. Taubert v. Roberts, 747 P.2d 1046 (Utah 1987).

Redemption.

—Amount to be paid.

——"Necessary maintenance, upkeep, or repair."

Pre-redemption expenses necessitated by an order from the city to demolish the buildings on the property were limited to those costs incurred in actually razing the building and in filling the crawl space, and did not include the cost of filling the entire lot to raise its level to that of surrounding properties, or the cost of tree removal. Galloway v. Merrill, 801 P.2d 942 (Utah Ct. App. 1990).

——Payment into court.

The intent of Subdivision (f)(3) is to allow a redemptioner to pay the funds into court so that the holder of the certificate of sale cannot clog the equity of redemption by refusing to cooperate in the redemption process. Granada, Inc. v. Tanner, 712 P.2d 254 (Utah 1985).

——Waste.

No provision exists, in either § 78-37-6 or Subdivision (f) of this rule, for the amount of

waste committed by a purchaser to enter into the formulation of the proper redemption amount. Huston v. Lewis, 818 P.2d 531 (Utah 1991).

—Construction of rule.

Foreclosure is in the nature of a forfeiture, which the law does not favor, and therefore, rules and statutes dealing with redemption are remedial in character and should be given a liberal construction. United States v. Loosley, 551 P.2d 506 (Utah 1976).

—Effect.

——Restoration of property to same condition.

The general effect of a redemption by the judgment debtor or his successor is that it restores the property to the same condition as if no sale had been attempted. Bennion v. Amoss, 530 P.2d 810 (Utah 1975).

——Waiver of irregularities.

By redeeming the property, debtor waived and was estopped from asserting any irregularities in the foreclosure sale. Bennion v. Amoss, 530 P.2d 810 (Utah 1975).

—How made.

——Defects in tender.

Where at time of tendered redemption payment by assignee of mortgagee to purchasers at sheriff's sale no grounds for rejection were made, subsequent claim that assignee's failure to include copy of judgment and amount of lien with payment was not deemed sufficient reason to reject tender. United States v. Loosley, 551 P.2d 506 (Utah 1976).

——Substantial compliance.

If a debtor, acting in good faith, has substantially complied with the procedural requirements of this rule in such a manner that the lender mortgagee is not injured or adversely affected, and is getting what he is entitled to, the law will not aid in depriving the mortgagor of his property for mere falling short of exact compliance with technicalities. United States v. Loosley, 551 P.2d 506 (Utah 1976).

Substantial compliance is the proper test under Subdivision (f)(2). Tech-Fluid Servs., Inc. v. Gavilan Operating, Inc., 787 P.2d 1328 (Utah Ct. App.), cert. denied, 795 P.2d 1138 (Utah 1990).

—*Timeliness.*

——Extension of time.

A court, sitting in equity, may in appropriate instances extend the period for redemption from sales on execution. Mollerup v. Storage Sys. Int'l, 569 P.2d 1122 (Utah 1977).

The matter of bankruptcy after foreclosure and sale does not constitute grounds for extending the time of redemption from sales on execution. Mollerup v. Storage Sys. Int'l, 569 P.2d 1122 (Utah 1977).

——Final adjudication of rights.

Where assignee of mortgagor who purchased prior to institution of foreclosure was not made a party to the foreclosure proceedings and his rights were not finally adjudicated until several months after foreclosure, he had six months after such adjudication in which to redeem. Carlquist v. Coltharp, 67 Utah 514, 248 P. 481, 47 A.L.R. 765 (1926).

——Strict compliance.

The right of a purchaser at a sheriff's sale either to receive the proper redemption amount in accordance with Subdivision (f) or to have the title perfected at the end of the six-month period is a substantive right. Accordingly, strict compliance with the six-month redemption period is normally required. Huston v. Lewis, 818 P.2d 531 (Utah 1991).

Attempted redemption by payment of the purchase price, plus interest, six months after sale followed by payment of the undisputed portion of delinquent taxes more than two months later neither strictly nor substantially complied with Subdivision (f)(3) and was properly denied as untimely. Springer v. Springer, 856 P.2d 358 (Utah 1993).

—Who may redeem.

——Assignee of attorney's lien.

Assignee of recorded attorney's lien has right to redeem property subject to that lien from the purchaser at sheriff's sale following mortgage foreclosure of the property. Downey State Bank v. Major-Blakeney Corp., 578 P.2d 1286 (Utah 1978).

——*Assignee of creditor.*

Where a grantee of the mortgagor took the assignment of a sheriff's sale certificate from a judgment creditor in a foreclosure suit, instead of taking a certificate of redemption, the assigned interest was subject to the redemption rights of the assignee of a creditor having a judgment lien subsequent to the foreclosure lien. Tanner v. Lawler, 6 Utah 2d 84, 305 P.2d 882, modified on another point, 6 Utah 2d 268, 311 P.2d 791 (1957).

——Bankruptcy trustee.

When a bankruptcy trustee was directed by court order to abandon her interest in an oil and gas well owned by the debtor, she necessarily abandoned any right to redeem that might arise in the event of foreclosure. Tech-Fluid Servs., Inc. v. Gavilan Operating, Inc., 787 P.2d 1328 (Utah Ct. App.), cert. denied, 795 P.2d 1138 (Utah 1990).

——Judgment debtor.

A judgment debtor can redeem from a judgment sale although he has parted with title prior to the sale. Clawson v. Moesser, 535 P.2d 77 (Utah 1975).

Remedies of purchaser.

—Dispossession.

——Scire facias.

Intent and purpose of statute on remedies of dispossessed purchaser was to afford the relief provided for by the common-law writ of scire facias pertaining to the revival of judgments. Continental Nat'l Bank & Trust Co. v. John H. Seely & Sons Co., 94 Utah 357, 77 P.2d 355, 115 A.L.R. 543 (1938).

—Failure to obtain possession.

——Modification of judgment.

Subdivision (g)(2) was not applicable where plaintiff obtained the property but wanted a modification of the judgment. Pitts v. McLachlan, 567 P.2d 171 (Utah 1977).

Cited in Utah Poultry & Farmers Coop. v. Bonie, 13 Utah 2d 13, 367 P.2d 860 (1962); First of Denver Mtg. Investors v. C.N. Zundel & Assocs., 600 P.2d 521 (Utah 1979).

COLLATERAL REFERENCES

Utah Law Review. — Equitable Considerations of Mortgage Foreclosure and Redemption in Utah: A Need for Remedial Legislation, 1976 Utah L. Rev. 327.

Recent Developments in Utah Law — Judicial Decisions — Real Property, 1989 Utah L. Rev. 318.

Am. Jur. 2d. — 30 Am. Jur. 2d Executions and Enforcement of Judgments § 1 et seq.; 47 Am. Jur. 2d Judicial Sales § 82 et seq.; 78 Am. Jur. 2d Waste § 9.

C.J.S. — 33 C.J.S. Executions §§ 1, 2, 44 et seq., 63 et seq., 69 et seq., 78, 94 et seq., 176, 201 et seq., 209, 211, 218 et seq., 224, 253, 254, 256 et seq., 257, 261, 269 et seq., 304, 305, 306 et seq., 312, 333, 362, 369, 370, 376, 383, 387 et seq., 407 et seq.; 49 C.J.S. Judgments § 34; 93 C.J.S. Waste § 12.

A.L.R. — Construction and effect of provision for execution sale on short notice, or sale in advance of judgment under writ of attachment, where property involved is subject to decay or depreciation, 3 A.L.R.3d 593.

Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons, or the like, 6 A.L.R.3d 1179.

Admissibility, in civil case, of expert or opinion evidence as to proposed witness' inability to testify, 11 A.L.R.3d 1360.

Death of creditor or obligee, validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by, 11 A.L.R.3d 1427.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint depositors, 11 A.L.R.3d 1465.

Allowance of mileage or witness fees with respect to witnesses who were not called to testify or not permitted to do so when called, 22 A.L.R.3d 675.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure, 27 A.L.R.3d 863.

Modification of judgment, execution sale as affected by, 32 A.L.R.3d 1019.

Right of guarantor or surety, in order to avoid paying amount in excess of his proportionate share, to compel co-guarantors or cosureties to pay their share to creditor, 38 A.L.R.3d 680.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 A.L.R.3d 607.

Right of junior mortgagee whose mortgage covers only a part of land subject to first mortgage to redeem pro tanto, where he was not bound by foreclosure sale, 46 A.L.R.3d 1362.

Wrongful execution against business property, injury to credit standing, reputation, solvency, or profit potential as elements of damage resulting from, 55 A.L.R.3d 911.

Mortgaged property, what constitutes waste justifying appointment of receiver of, 55 A.L.R.3d 1041.

Failure or refusal of witness to give testimony, tort or statutory liability for, 61 A.L.R.3d 1297.

Garnishee's duty to give debtor notice of garnishment prior to delivery of money without judgment against the garnishee on the debt, 36 A.L.R.4th 824.

Liquor license as subject to execution or attachment, 40 A.L.R.4th 927.

Lien of judgment on excess value of homestead, 41 A.L.R.4th 292.

Constitutionality, construction, and application of statute as to effect of taking appeal, or staying execution, on right to redeem from execution or judicial sale, 44 A.L.R.4th 1229.

Right of interested party receiving due notice of tax sale or of right to redeem to assert failure or insufficiency of notice to other interested party, 45 A.L.R.4th 447.

Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy, 51 A.L.R.4th 906.

Validity, construction, and effect of body execution statutes allowing imprisonment based on judgment, debt, or the like — modern cases, 79 A.L.R.4th 232.

Propriety and effect of corporation's appearance pro se through agent who is not attorney, 8 A.L.R.5th 653.

Key Numbers. — Execution ⇐ 1, 3, 35 et seq., 64, 67, 68, 69, 75, 78 et seq., 90, 127 et seq., 185, 222, 223, 226, 238, 241, 281, 282, 285 et seq., 291, 293, 295, 296 et seq., 301, 305 et seq., 348, 373 et seq., 385 et seq., 390, 395, 402, 407 et seq., 421 et seq.; Judgments ⇐ 532; Waste ⇐ 12.

Rule 70. Judgment for specific acts; vesting title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance and upon order of the court, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others

and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

Compiler's Notes. — This rule is similar to Rule 70, F.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d Specific Performance § 179 et seq.

C.J.S. — 81A C.J.S. Specific Performance §§ 168 to 170.

A.L.R. — Lis pendens in suit to compel stock transfer, 48 A.L.R.4th 731.

Key Numbers. — Specific Performance ⇐ 131, 132.

Rule 71A. Process in behalf of and against persons not parties.

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

Compiler's Notes. — This rule is identical to Rule 71, F.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments § 757 et seq.

C.J.S. — 49 C.J.S. Judgments §§ 585 to 590.

Key Numbers. — Judgment ⇐ 854, 855.

Rule 71B. Proceedings where parties not summoned.

(a) **Effect of failure to serve all defendants.** Where the action is against two or more defendants and the summons is served on one or more, but not all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

(b) **Proceedings after judgment against parties not originally served.** When a judgment has been recovered against one or more, but not all, of several persons jointly indebted upon an obligation, the plaintiff may require any person not originally served with the summons to appear and show cause why he should not be bound by the judgment in the same manner as though he had been originally served with process.

(c) **Summons and affidavit; contents and service.** The plaintiff shall issue a summons, describing the judgment, and requiring the defendant to appear within the time required for appearance in response to an original summons, and show cause why he should not be bound by such judgment. The summons, together with a copy of an affidavit on behalf of the plaintiff to the effect that the judgment, or some part thereof remains unsatisfied, and specifying the amount actually due thereon, shall be served upon the defendant and returned in the same manner as the original summons.

(d) **What constitutes the pleadings.** The pleadings shall consist of plaintiff's affidavit, the summons, and the answer of the defendant, if any; provided that if defendant denies his liability on the obligation upon which the judgment was originally recovered, a copy of the original complaint and judgment shall be included.

(e) **Hearing; judgment.** The matter may be tried as other cases; but if the issues are found against the defendant, the judgment shall not exceed the amount of the original judgment remaining unsatisfied, with interest and costs.

Compiler's Notes. — There is no federal rule covering this subject matter.

Cross-References. — Authorizing service of process on other defendants, Rule 4(b).

Tab 2

possession. Seeley v. Houston, 105 Utah 202, 141 P.2d 880 (1943).

Liability.

— Lessor.

Where, without serving the three days' notice required by § 78-36-3(1)(c), a lessor entered the premises of his tenant, whose rent was two months in arrears, changed the locks on the doors and refused to allow the tenant to enter to remove equipment and perishable goods, lessor was guilty of forcible detainer and conversion of the personal property on the premises. Peterson v. Platt, 16 Utah 2d 330, 400 P.2d 507 (1965).

— Purchaser.

Where purchaser of state land took possession of land while lessee from state was away and refused to quit premises upon demand, he was liable for forcible entry and detainer, since such purchaser should have made proper demand, and if it was refused, should have settled question of possession by law. Paxton v. Fisher, 86 Utah 408, 45 P.2d 903 (1935); Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

Fact that one of defendants in forcible detainer action by lessee of state land had signed purchase contract covering such land would not, in itself, make him personally liable. Paxton v. Fisher, 86 Utah 408, 45 P.2d 903 (1935); Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

Occupancy "within five days."

— Allegation.

Allegation of "more" than five days includes period of "within" five days. Woodbury v. Bunker, 98 Utah 216, 98 P.2d 948 (1940); American Mut. Bldg. & Loan Co. v. Jones, 102 Utah 318, 117 P.2d 293 (1941), rehearing denied, 102 Utah 328, 133 P.2d 332 (1943).

"Unlawfully enters."

"Unlawfully enters" in Subsection (2) means unlawfully as relating to an occupant who was there within five days. Woodbury v. Bunker, 98 Utah 216, 98 P.2d 948 (1940); Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

COLLATERAL REFERENCES

Am. Jur. 2d. — 35 Am. Jur. 2d Forcible Entry and Detainer § 1.

C.J.S. — 36A C.J.S. Forcible Entry and Detainer §§ 1, 2.

Key Numbers. — Forcible Entry and Detainer ⇐ 5.

78-36-3. Unlawful detainer by tenant for term less than life.

(1) A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

(a) when he continues in possession, in person or by subtenant, of the property or any part of it, after the expiration of the specified term or period for which it is let to him, which specified term or period, whether established by express or implied contract, or whether written or parol, shall be terminated without notice at the expiration of the specified term or period;

(b) when, having leased real property for an indefinite time with monthly or other periodic rent reserved:

(i) he continues in possession of it in person or by subtenant after the end of any month or period, in cases where the owner, his designated agent, or any successor in estate of the owner, 15 days or more prior to the end of that month or period, has served notice requiring him to quit the premises at the expiration of that month or period; or

(ii) in cases of tenancies at will, where he remains in possession of the premises after the expiration of a notice of not less than five days;

(c) when he continues in possession, in person or by subtenant, after default in the payment of any rent and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained

premises, has remained uncomplied with for a period of three days after service, which notice may be served at any time after the rent becomes due;

(d) when he assigns or sublets the leased premises contrary to the covenants of t .e lease, or commits or permits waste on the premises, or when he sets up or carries on any unlawful business on or in the premises, or when he suffers, permits, or maintains on or about the premises any nuisance, including nuisance as defined in Section 78-38-9, and remains in possession after service upon him of a three days' notice to quit; or

(e) when he continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those previously mentioned, and after notice in writing requiring in the alternative the performance of the conditions or covenant or the surrender of the property, served upon him and upon any subtenant in actual occupation of the premises remains uncomplied with for three days after service. Within three days after the service of the notice, the tenant, any subtenant in actual occupation of the premises, any mortgagee of the term, or other person interested in its continuance may perform the condition or covenant and thereby save the lease from forfeiture, except that if the covenants and conditions of the lease violated by the lessee cannot afterwards be performed, then no notice need be given.

(2) Unlawful detainer by an owner resident of a mobile home is determined under Title 57, Chapter 16, Mobile Home Park Residency Act.

(3) The notice provisions for nuisance in Subsection 78-36-3(1)(d) are not applicable to nuisance actions provided in Sections 78-38-9 through 78-38-16 only.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-3; L. 1981, ch. 160, § 1; 1986, ch. 137, § 1; 1989, ch. 101, § 1; 1992, ch. 141, § 2.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, inserted "including nuisance as defined in Section 78-38-9," in Subsection (1)(d) and added Subsection (3).

Cross-References. — Nuisances, Title 47.

Right to recover treble damages from tenants committing waste, § 78-38-2.

NOTES TO DECISIONS

Analysis

Cause of action.

— Default in rent.

No cause of action for unlawful detainer

based on default in payment of rent survived where tenant tendered rent due within three days after service of unlawful detainer action, regardless of defects in such notice. Dang v. Cox Corp., 655 P.2d 658 (Utah 1982).

— Prerequisites.

Notice to quit is necessary to give rise to cause of action. Carstensen v. Hansen, 107 Utah 234, 152 P.2d 954 (1944).

Service of the statutory notice and the tenant's noncompliance are prerequisites to the tenant's being in unlawful detainer. Olympus Hills Shopping Ctr., Ltd. v. Landes, 821 P.2d 451 (Utah 1991).

— Presumptions.

Action of unlawful detainer presupposes absence of fraud and force, as well as existence of relation of landlord and tenant. Holladay Coal Co. v. Kirker, 20 Utah 192, 57 P. 882 (1899).

— When determined.

Whether a cause of action exists under this section is to be determined at the time the action is commenced. Van Zyverden v. Farrar, 15 Utah 2d 367, 393 P.2d 468 (1964).

— When exists.

Upon expiration of tenant's lease, the tenant is subject to ouster by an unlawful detainer action (not forcible detainer) under and pursuant to this section. Woodbury v. Bunker, 98 Utah 216, 98 P.2d 948 (1940); American Mut. Bldg. & Loan Co. v. Jones, 102 Utah 318, 117 P.2d 293 (1941), rehearing denied, 102 Utah 328, 133 P.2d 332 (1943).

Unless tenant has retained the right to refuse inspection by prospective purchasers of premises, unreasonable refusal to permit entry of premises for that purpose constitutes unlawful detainer. Glenn v. Keyes, 107 Utah 415, 154 P.2d 642 (1944).

Federal regulations.

— Modification of state remedies.

OPA rental and housing regulations, under Federal Price Control Act, were binding upon Utah courts and modified any state remedy to extent that such remedy was in conflict with that act. Callister v. Spencer, 113 Utah 497, 196 P.2d 714 (1948).

In general.

This chapter takes away the landlord's common law right to use self-help to remove a tenant, grants the landlord a summary court proceeding to evict a tenant who has violated some express or implied provision of the lease, and provides five instances in which the tenant is in unlawful detainer. The remedy for a successful landlord is restitution of the premises, treble damages, and recovery for waste or rent due. If the unlawful detainer action is based on default in payment of rent, the judgment will also mandate forfeiture of the lease. P. H. Inv. v. Oliver, 818 P.2d 1018 (Utah 1991).

Notice to quit.

— Administrative claim.

Notice to quit or pay rent served on government as required by this section was not an administrative claim sufficient to satisfy 28 U.S.C. § 2675(a), and federal court therefore had no jurisdiction over forcible entry and detainer action brought under Federal Tort Claims Act. Three-M Enters., Inc. v. United States, 548 F.2d 293 (10th Cir. 1977).

— Liability of tenant.

Action by lessor, after end of fixed term of lease, to terminate lease and require lessee to vacate premises did not terminate provision obliging tenant to pay attorney fees, where parties entered stipulation, while matter was pending, that lessee considered lease in effect and held under it after end of fixed term. Milliner v. Farmer, 24 Utah 2d 326, 471 P.2d 151 (1970).

— Prerequisites.

Notice in accordance with Subsection (1)(e) should precede notice to quit, and must be uncomplied with for five days after the service before a notice to quit is in order. Fireman's Ins. Co. v. Brown, 529 P.2d 419 (Utah 1974).

— Sufficiency.

A notice to quit is sufficient under Subsection (1)(b) in the case of a tenancy at will, as provided in contract of sale in case of default, where it merely declares a forfeiture, and is not insufficient under Subsection (1)(e) because not giving purchasers alternative of performing conditions of the agreement. Forrester v. Cook, 77 Utah 137, 292 P. 206 (1930); American Holding Co. v. Hanson, 23 Utah 2d 432, 464 P.2d 592 (1970).

Notice to quit which notified tenant that he was violating substantial obligations of tenancy by conducting certain businesses on premises, and which plainly informed tenant that he must desist from such objectionable practices by certain date and that, if on or before that date he failed to desist therefrom and had not surrendered premises, action would be commenced for restitution of premises, was not defective because notice was not expressed in the alternative as required by Subsection (1)(e) of former § 104-60-3, i.e., that violation must cease or tenancy be vacated, since such was plain intent of notice without use of word "or." Callister v. Spencer, 113 Utah 497, 196 P.2d 714 (1948).

Notice by landlord stating that tenants had failed to make payments of rent due under lease, had failed to pay utility bills, and further

providing that tenants were to quit premises and deliver up possession to landlord within fifteen days did not comply with statutory requirements under this section; in absence of compliance, landlord was not entitled to maintain action for restitution of premises. American Holding Co. v. Hanson, 23 Utah 2d 432, 464 P.2d 592 (1970).

Notice of forfeiture, while sufficient to terminate a lease for breach of covenant, is not sufficient to put lessee in unlawful detainer; the notice to quit must be in the alternative, i.e., either perform or quit, before lessee becomes subject to the provisions of this chapter. Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976).

Lessee was not in unlawful detainer and lessor was not entitled to maintain an action under this section where lessor's notice to vacate premises was defective in that it did not state that lessee had the alternative of paying the delinquent rent or surrendering the premises. Sovereen v. Meadows, 595 P.2d 852 (Utah 1979).

A notice to a month-to-month tenant to quit the premises need not contain the alternative of paying rent. Ute-Cal Land Dev. v. Intermountain Stock Exch., 628 P.2d 1278 (Utah 1981).

The critical distinction between a notice of unlawful detainer and a notice of forfeiture is that the notice of forfeiture simply declares a termination of the lease without giving the lessee the alternative of making up the deficiency. Dang v. Cox Corp., 655 P.2d 658 (Utah 1982).

Letter stating that "[i]n the event that [lessee] does not immediately re-open and continuously conduct normal business operations in the premises, [lessor] will terminate the Lease ... as well as seek damages and all other available legal relief for the breach" met the requirements of Subsection (1)(e). Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc., 889 P.2d 445 (Utah Ct. App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995).

— Tenancy at will.

At common law a tenant at will was not entitled to notice to quit possession. Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

It is only after buyer is in the status of a tenant at will that he is amenable to the notice provided by this section, which requires him to vacate within five days or be guilty of an unlawful detainer. Van Zyverden v. Farrar, 15 Utah 2d 367, 393 P.2d 468 (1964).

Where lease was terminated by failure of tenant to pay rent and taxes, the tenant became a tenant at will and landlord properly proceeded to regain possession by the procedure set forth in Subsection (1)(b) by giving notice to vacate. Shoemaker v. Pioneer Invs., 14 Utah 2d 250, 381 P.2d 735 (1963).

Notice to purchaser who had become tenant at will for failure to make payment was sufficient under Subsection (1)(e) even though several months had elapsed between first and final notice. Beneficial Life Ins. Co. v. Dennett, 24 Utah 2d 310, 470 P.2d 406 (1970).

Persons liable.

No one but tenant of real property for term less than life can be guilty of unlawful detainer. Holladay Coal Co. v. Kirker, 20 Utah 192, 57 P. 882 (1899).

Pleadings.

— Tenancy at will.

Since on month-to-month tenancy owner could recover property on fifteen-day notice, allegation in complaint that such tenant had violated substantial obligations of rental agreement was not necessary in unlawful detainer action. Callister v. Spencer, 113 Utah 497, 196 P.2d 714 (1948).

Right of re-entry.

— Contractual provisions.

Under contract for sale and exchange of real estate, providing that seller at his option could re-enter premises and be released from his obligations upon default of buyer, seller was bound to give buyer notice of his intention to take advantage of forfeiture provision of contract, since such provision was not self-executing. Leone v. Zuniga, 84 Utah 417, 34 P.2d 699, 94 A.L.R. 1232 (1934).

Strict performance.

— Waiver.

Acceptance by vendor of purchaser's past-due payments under uniform real estate contract, and other conduct leading latter to believe that strict performance would not be required by vendor, imposes duty on vendor to give purchaser reasonable notice before vendor may insist on strict performance by purchaser. Pacific Dev. Co. v. Stewart, 113 Utah 403, 195 P.2d 748 (1948).

Strict statutory compliance.

— Not required.

There is no reason for the strict rule that landlord must demand the precise or exact amount of rent due or lose his right to recover possession of the premises. A tenant is guilty of unlawful detainer when he continues in possession after default in payment of any rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the premises, etc. Commercial Block Realty Co. v. Merchants' Protective Ass'n, 71 Utah 505, 267 P. 1009 (1928).

— Required.

This section, which provides a severe remedy, must be strictly complied with before the cause of action thereon may be maintained. Van Zyverden v. Farrar, 15 Utah 2d 367, 393 P.2d 468 (1964).

Substantial compliance.

The substantial compliance doctrine applies in some residential lease situations to defeat a landlord's attempt to forfeit a lease because of a tenant's minor breach. Housing Auth. v. Delgado, 914 P.2d 1163 (Utah Ct. App. 1996).

The substantial compliance doctrine furthers the courts' general policy disfavoring forfeitures by allowing equity to intervene and rescue a lessee from forfeiture of a lease when the lessee has substantially complied with the lease in good faith. Housing Auth. v. Delgado, 914 P.2d 1163 (Utah Ct. App. 1996).

Trial court correctly determined that the equitable doctrine of substantial compliance applies to residential leases in Utah, and its findings that defendant had substantially complied with lease at issue was supported by adequate evidence. Housing Auth. v. Delgado, 914 P.2d 1163 (Utah Ct. App. 1996).

Termination of lease.

A lease may be terminated pursuant to an unlawful detainer action. Hackford v. Snow, 657 P.2d 1271 (Utah 1982).

Treble damages.

— Contract of sale.

In a suit for amounts due under a contract of sale of real estate, where the vendors gave notice of forfeiture of the contract only and did not give the purchaser an alternative to pay up or quit, as is required under this section, the vendors were not entitled to treble damages for unlawful detainer. Erisman v. Overman, 11 Utah 2d 258, 358 P.2d 85 (1961).

— Intervenor.

A person not actually occupying the premises who intervenes in an action to obtain possession and for damages for unlawful detainer, and who asserts ownership and the right to possession by the occupier as his tenant, may be guilty of unlawful detainer and liable for treble damages where the court finds this intervener's claim invalid. Tanner v. Lawler, 6 Utah 2d 84, 305 P.2d 882, modified on another point, 6 Utah 2d 268, 311 P.2d 791 (1957).

— Lease.

Under a lease contract for a period of years, in which the lessee defaulted, notice by the lessor for the lessees to quit the premises was not sufficient for treble damages. Under such a lease the statutes require an alternative notice that the tenant either perform or quit before he becomes an unlawful detainer and subject to treble damages. Jacobson v. Swan, 3 Utah 2d 59, 278 P.2d 294 (1954).

COLLATERAL REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d Landlord and Tenant § 352 et seq.; 50 Am. Jur. 2d Landlord and Tenant § 264 et seq.

C.J.S. — 52A C.J.S. Landlord and Tenant § 758.

A.L.R. — Right of landlord legally entitled to possession to dispossess tenant without legal process, 6 A.L.R.3d 177.

Grazing or pasturage agreement as violation of covenant in lease or provision of statute against assigning or subletting without lessor's consent, 71 A.L.R.3d 780.

Express or implied restriction on lessee's use of residential property for business purposes, 46 A.L.R.4th 496.

Landlord's permitting third party to occupy premises rent-free as acceptance of tenant's surrender of premises, 18 A.L.R.5th 437.

Key Numbers. — Landlord and Tenant ⇦ 290.

78-36-4. Right of tenant of agricultural lands to hold over.

In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than 60 days after the expiration of his term without any demand of possession or notice to quit by the owner, his designated agent, or his successor in estate, he shall be deemed to be held by permission of the owner, his designated agent, or his successor in estate, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during that year; and the holding

Tab 3

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SHANGRI-LA GARDEN APARTMENTS,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 0902686 970902686
vs.	:	
UAW PROPERTIES, L.C., et al.,	:	
Defendants.	:	
	:	
UAW PROPERTIES, L.C.; DLM INVESTMENTS, L.L.C.,	:	
Counterclaimants,	:	
vs.	:	
SHANGRI-LA GARDEN APARTMENTS	:	
Counterdefendant.	:	

This matter was tried to the Court on April 13, 1998. At that time the Court received testimony, heard oral argument, and having taken the matter under advisement, now finds and rules as follows:

The plaintiff attacks the Judgment foreclosure sale on the subject property by first saying that it did not receive adequate notice of the sale. The Court finds that adequate notice was given in that notice was sent to the address used by plaintiff when it instituted the small claims action which initially gave rise to the Judgment, when notice was posted on the property, left at the manager's office, and further when published as required by law.

Plaintiff also attacks the Judgment by arguing that the execution sale was not authorized by the Schwichts. The Court finds that Mr. Olsen was authorized to act on behalf of Mr. Hagen, who was authorized by the Schwichts to collect on the Judgment.

Plaintiff argues that a settlement agreement had been reached between plaintiff's counsel and Mr. Olsen prior to the sale. The Court finds that no settlement agreement had been reached and that Mr. Olsen had agreed to stop the sale of the property only if he had received payment on the Judgment prior to the sale.

Plaintiff also argues that the underlying Judgment is against a nonexistent party. The Court rejects this argument. The initial action against the Schwichts was brought by plaintiffs in the name of Shangri-La Garden Apartments, UBO. Plaintiff brought this action in the name of Shangri-La Garden Apartments. Stanley Wade has filed an Affidavit indicating he is the sole trustee of Shangri-La Garden Apartments, UBO. A subsequent action against the Schwichts for fraud was filed in the name of Shangri-La Garden Apartments, Inc. The Complaint in this matter, which is signed by Stanley Wade as trustee for Shangri-La Garden Apartments, alleges that "Shangri-La Garden Apartments" as plaintiff was the "sole and exclusive fee owner of the property...." The Court is of the opinion that under all of the circumstances of this case, that the

Judgment was obtained against the owner of the property in question.

Plaintiff argues that the Writs of Execution were issued improperly because of the addition of attorney's fees. It should be noted, however, that the plaintiff accepted and cashed, without objection, the check for the excess proceeds it received from the sheriff's sale.

In any event, the Court feels that the arguments made by plaintiff to invalidate the sale are an impermissible collateral attack on the Judgment. The Court finds that the execution sale was valid.

The Court turns to the question of equitable redemption. The Court finds in this case that the plaintiff, through Mr. Wade, had notice of the execution sale prior to the sale. The Court also finds that the plaintiff, through Mr. Stan Wade, knew by September 19, 1996 or within a few short days thereafter that the property had been sold and that there would need to be a redemption. Clearly, Mr. Henderson, Shangri-La's attorney, knew by September 19, 1996 that the sheriff's sale had taken place. That is the date that he wrote to Mr. Wade advising Mr. Wade that he had received back the check from Mr. Olsen which was intended to pay the Judgment, and advising Mr. Wade that there would need to be a

redemption. This information known to Mr. Henderson, as Mr. Wade's attorney, would be charged to Mr. Wade.

Having made the foregoing findings, the Court is nevertheless of the opinion that the redemption period should be extended in this case and that the equitable redemption sought by the plaintiff should be allowed. The enormous discrepancy between the value of the property and the amount for which the property was purchased compels the Court to this result. It should be noted that Mr. Wade did indeed make efforts to pay the Judgment prior to the sheriff's sale, and quite certainly was under the impression that that had been accomplished through his attorney, Mr. Henderson. It is inexplicable to the Court why, having received information from Mr. Henderson that the sale had taken place, the plaintiff did not take immediate steps to redeem the property. Mr. Wade and his wife have owned, developed and cared for this property for over 25 years. The Court feels that the circumstances of this case are exceptional and that it would shock the conscience of the Court to allow this $4.2 million piece of property to be purchased for $8,000.

The defendants point to the fact that Mr. Wade has been dilatory in this case by not complying with discovery rules. While that may or may not be so, there are remedies for such conduct and

the Court has not considered those in determining the equities bearing on the equitable redemption issue.

The Court is of the opinion that defendants UAW Properties and DLM Investments are entitled to a return of their purchase price, plus attorney's fees incurred and taxes paid on the property, together with rents received on the property from the time of their purchase until the time of trial, which appears to be the amount of $304,333. Defendants claim that that amount should be trebled. The Court feels that the parties did not adequately address that issue and will ask defendants to file a short brief within ten (10) days hereof arguing for the trebling of damages. Plaintiff will then have ten (10) days thereafter within which to file its brief, and then defendants may have five (5) days thereafter to file a reply. Defendants should then file a "Notice to Submit".

The parties have stipulated that the attorney's fees could be reserved. Counsel for defendants are to prepare their Affidavit of Attorney's Fees within ten (10) days. Plaintiff will then have ten (10) days thereafter if they wish to respond, at which time the Court will rule.

Counsel for defendants UAW Properties and DLM Investments is to prepare a more detailed set of Findings of Fact and Conclusions of Law, together with an Order and Judgment, and submit it to

opposing counsel for approval as to form, and then to this Court for signature.

Dated this 5 day of May, 1998.

FRANK G. NOEL
DISTRICT COURT JUDGE

STATE OF UTAH

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 5th day of May, 1998:

Shawn Turner, Esq.
4516 South 700 East, Suite 100
Salt Lake City, Utah 84107

Thomas J. Klc, Esq.
4725 S. Holladay Blvd., Suite 110
Salt Lake City, Utah 84117

Stephen B. Mitchell
Attorney for Defendants UAW and DLM
139 E. South Temple, Suite 2001
Salt Lake City, Utah 84111

Brenda Klenke

Tab 4

SHAWN D. TURNER (5813)
LARSON, KIRKHAM & TURNER
Attorneys for Plaintiff and
Counterdefendant
4516 South 700 East, Suite 100
Salt Lake City, Utah 84107
(801) 263-2900

IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION I

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SHANGRI-LA GARDEN APARTMENTS, :	**RESPONSE TO MEMORANDUM OF DEFENDANT'S UAW PROPERTIES, L.C. AND DLM INVESTMENTS, L.L.C. RE: TREBLED DAMAGES**
Plaintiffs, :	
vs. :	
UAW PROPERTIES, L.C., et al., :	Civil No. 970902686QT Judge Frank G. Noel
Defendants. :	
UAW PROPERTIES, L.C., et al., :	
Counterclaimants, :	
vs :	
SHANGRI-LA GARDEN APARTMENTS, :	
Counterdefendants. :	

COMES NOW the Plaintiffs, by and through their counsel and pursuant to order of the court do hereby respond to the Memorandum of Defendant's UAW Properties, L.C. and DLM Investments, L.L.C. Re: Trebled Damages.

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO TREBLED DAMAGES.

A. The Unlawful Detainer Statute Does Not Apply in this Case.

Defendants claim that they are entitled to trebled damages under UCA § 78-36-3 et. seq. The unlawful detainer statutes however do not apply to the Plaintiff in this case.

By its express language the statute applies only to unlawful detainer "by a tenant for a term less than life." The Plaintiffs in this action are not now nor have they ever been tenants of the property in question.

It is one of the most well defined principles of statutory construction that a statute is to be construed according to its plain language. The plain language of the statute here makes it applicable only to tenants of real property. Under no stretch of the imagination could the Plaintiffs in this action be considered tenants and therefore the statute is inapplicable and Defendants are not entitled to trebled damages.

B. Even If Plaintiffs Were Tenants, They Would Not Be an Unlawful Detainer.

If by some stretch of the imagination the Plaintiffs could be termed as tenants they still would not be in unlawful detainer. Utah Code Annotated § 78-36-9 provides:

> On the trial of any proceedings for any forcible entry or forcible detainer the Plaintiff's shall only be required to show in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession att he time of the forcible detainer. The Defendant may show in his defense that he or his ancestors or those whose interests in such premises he claims, had been in the quiet possession thereof for the space of one whole year continuously next before the commencement of the proceedings, and that his interest therein has not been ended or determined; and such showing is a bar to the proceedings.

The undisputed facts at the time of the trial show that Plaintiffs have been in possession for much longer than one year prior to the commencement of these proceedings. The courts finding that the Plaintiff has a right to equitable redemption clearly is a finding that the interest of the Plaintiff had not yet been determined and has not yet ended. Under these circumstances it is the Plaintiffs and not the Defendants who have prevailed on this issue and it is the Plaintiffs and not the Defendants who is entitled to their attorneys fees in having had to defend the same.

C. The Court Has Not Found an Unlawful Detainer.

In the Memorandum Decision of the Court, there has been no finding that an unlawful detainer on the part of the Plaintiff.

In light of the fact that there has been no finding of an unlawful detainer the Defendants are not entitled to trebled damages which are solely based on such a conclusion of law. Accordingly the request for trebled damages must be denied.

II. THE DEFENDANTS ARE NOT ENTITLED TO THE REQUESTED ATTORNEY FEES.

Plaintiffs are the prevailing parties in this action. It was Plaintiffs who claimed they were entitled to possession of the property pursuant to the doctrine of equitable redemption and it was the defendants who opposed that. There is no contract between the parties and there is no statute which provides for the awarding of attorneys fees to the Defendants in this action.

There are two purported bases for the potential award of attorneys fees in this action. One would be the unlawful detainer statute which, as shown above, either does not apply or under which the Plaintiffs are in fact the prevailing party and therefore Defendants are not entitled to fees under that statute. The secondary potential source for award of attorneys fees would be the doctrine of equitable redemption itself. The cases for equitable redemption provide that the party seeking to redeem should be required to pay the reasonable and necessary expenses of the other party. Those expenses can not and should not include the costs of the party opposing the suit itself. The only attorneys fees that should be awardable would be those fees incurred in the actual purchase of the property. Where, as in this case, the Defendants did not purchase the property at the auction, the awardable fees would be those fees which they incurred in acquiring the property from the parties who purchased the property at auction. A review of the Affidavit of Steven B. Mitchell discloses that there are no attorneys fees that have been charged for that particular item. Accordingly, none of the requested attorneys fees should be awarded.

DATED this 26th day of May, 1998

LARSON, KIRKHAM & TURNER

Shawn D. Turner

SHANGRI DAM

CERTIFICATE OF MAILING

I hereby certify that on this 26th day of May, 1998, I mailed postage prepaid a copy of the foregoing document to the following:

Richard Burbidge, Esq.
Stephen B. Mitchell, Esq.
Burbidge & Mitchell
139 E. South Temple, Suite 2001
Salt Lake City, Utah 84111-1103

Tab 5

Utah Supreme Court

)9/23/2003

Docket Event Listing

ıangri-La v. UAW Properties

)cket No: 981743 Docket Date: 11/17/1998
)p. Type: Civil Appeal
Agency: THIRD DISTRICT, SALT LAKE Case: 970902686
Status: Closed

ıangri-La Garden Apartments - Appellant & Cross Appellee
FRANCIS M. WIKSTROM (PARSONS, BEHLE & LATIMER)
DIANNA M. GIBSON (PARSONS, BEHLE & LATIMER)
\W Properties, L.C. - Appellee & Cross Appellant
STEPHEN B. MITCHELL (BURBIDGE & MITCHELL)
ıangri-La Apartments, Inc. - Appellant & Cross Appellee
FRANCIS M. WIKSTROM (PARSONS, BEHLE & LATIMER)
DIANNA M. GIBSON (PARSONS, BEHLE & LATIMER)

11/17/1998 Notice of Appeal Filed

: 11/19/1998 Notice of Cross Appeal
.led by Burbidge & Mitchell.

} 11/20/1998 Transcript Request Received
ıted 11/20/98. Needs 4/13/98.

! 11/24/1998 Ack. of Request for Transcript
-anscript assigned to APR court reporters.

› 11/25/1998 Docketing Statement Filed

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5 12/07/1998 Cross-Appellant's Docketing St

' 05/04/1999 Misc. Letter
› Bunny Neuenschwander regarding the status of the transcripts.

} 05/17/1999 Default Letter Sent
› APR for late transcript.

› 05/19/1999 Notice of Transcript Filed TC
'R, Dana Karren, has filed the transcripts in district court.

› 06/01/1999 Misc Motion Denied 09/20/1999 IDS
›tion to stay district court order

06/01/1999 Memorandum of Points & Authori
:morandum in support of motion for stay

' 06/03/1999 Extension of Time-Misc.
ıpulation for extension of time up to June 17, 1999 to respond to
›tion for Stay. *Motion for Stay

} 06/15/1999 Misc Motion Moot 09/20/1999

n of appellees and cross-appellant to strike portions of the
avit of Shawn Turner

/15/1999 Opposition to Motion
andum in opposition to motion to stay

)/17/1999 Default Letter Sent
:e of default to district court. Record index is past due.

)/22/1999 Calendared for Law & Motion
luled on: Mon, Jul. 19, 1999 at: 09:30 *Reset for Aug. 16 at 9:30.
.: Durham, Stewart, Zimmerman *Motion for stay

5/25/1999 Called Attorney
ı Turner does not object to court recheduling Motion for Stay to the
st 16 L&M Calendar.

5/25/1999 Misc. Letter
er from Stephen Mitchell requesting that Motion to Stay which is set
:he July 19 L&M Calendar be reset to the August 16 L&M calendar.

5/29/1999 Record Index Filed

6/30/1999 Calendared for Law & Motion
for Monday, August 16, 1999, at 9:30 a.m.
1: MDZ, CMD, IDS *Motion for Stay *Re-set for September Calendar.

8/09/1999 Misc Motion
on for continuance of hearing.
ring has been continued to September. No formal order was signed
use notice is sufficient.

8/09/1999 Calendared for Law & Motion
duled on: Mon, Sep. 20, 1999 at: 09:30
1: Durham, Stewart, Zimmerman *Motion for stay

8/09/1999 Removed from Law & Motion Cale
on to Stay moved from August L&M Calendar to September L&M Calendar.

)8/25/1999 Notice of Address Change
firm of LARSON, KIRKHAM & TURNER has been changed to LARSON, TURNER,
:BANKS & DALBY.

)9/07/1999 Set Briefing Schedule
:llant's brief is due 10-20-99.

)9/20/1999 Misc Motion Denied IDS
:S HEREBY ORDERED that plaintiff's Motion for a Stay is denied.

10/06/1999 Appearance of Counsel
ıcis M Wikstrom and Dianna M. Gibson of Parsons Behle & Latimer
ear as counsel for appellants.

10/07/1999 Extension of Time for AppellanStipulatio
ely Filed, 1st Extension for 30-Days and Stipulated that Appellant's
ef will be due on NOVEMBER 19, 1999.

10/12/1999 Extension of Time-Misc. Moot 10/20/1999
ion to enlarge time to file appellant's motion for summary disposition

This motion is moot because the court has declined to accept the
appellant's motion for summary reversal.

) 10/12/1999 Memorandum of Points & Authori
emorandum in support of motion to enlarge time

10/12/1999 Appearance of Counsel
nald C. Barker appears as co-counsel with Shawn D. Turner as counsel
r appellant.

10/12/1999 Motion-Appellant-Summary DispoStricken 10/20/1999 RCH
e court declines to accept plaintiff's motion for summary reversal and
fers consideration of the issues raised until plenary review. The
rties should proceed to the next stage in the appellate process.

10/12/1999 Memorandum of Points & Authori
morandum in support of appellant's motion for summary disposition

---

10/18/1999 Opposition to Motion
pellees' memorandum in opposition to appellant's motion to enlarge time
o file motion for summary disposition]

10/18/1999 Memorandum of Points & Authori
norandum in support of appellees' motion for protective order

---

10/18/1999 Misc Motion Moot 10/20/1999
pellee's motion for protective order
his motion is moot because the court has declined to accept the
pellant's motion for summary reversal.

10/20/1999 Misc. Order RCH
e court declines to accept plaintiff's motion for summary reversal and
fers consideration of the issues raised until plenary review. The
ties should proceed to the next stage in the appellate process.

10/21/1999 Response to Motion
pellant's response to appellees' motion for a protective order.

10/21/1999 Reply to Response to Motion
pellant's reply to respondents' opposition to motion to enlarge time

---

10/26/1999 Ack. of Request for Transcript
igned to Carolyn Erickson, court reporter, to transcribe hearing date
4/98.

10/27/1999 Notice of Transcript Filed TC
olyn Erickson filed her transcript of 4/14/98 in district court.

11/18/1999 Supplemental Record Index File
ludes additional transcript of 4/14/98.

11/19/1999 Appellant's Brief Filed

11/22/1999 Notice
ellants request oral argument in the above-captioned case.

12/13/1999 Extension of Time for AppelleeStipulatio12/13/1999
pulation for extension of time to file brief of appellees and

-appellants.

/21/2000 Brief Lodged
lee/Cross-Appellant's Red Brief is lodged for insufficient number of
s.

/24/2000 Appellee, X-Appellant Brief Fi

/04/2000 Extension of Time for Reply BrStipulatio
ılated, Timely filed for 30 days, Appellants/Cross-appellees Reply
will be due on MARCH 24, 2000.

3/24/2000 Appellant's Reply Brief Filed

1/14/2000 Extension of Time for Reply Br
ılated 30 day extension for Appellees Cross-Appellant's Reply Brief.
Properties, L.C., and DLM Investments, L.L.C. Cross Appellant's Reply
f will be due on MAY 24, 2000. (Docket Code XAER)

5/05/2000 Withdrawal of Counsel
ld C. Barker hereby withdraws as co-counsel for appellant, Shangri-La
en Apartments.

5/19/2000 Appellee, X-Appt. Reply Brief
llees/Cross-Appellants, UAW Properties, Reply Brief.

6/09/2000 Withdrawal of Counsel
n D. Turner, attorney for Shangri-La Garden Apartments gives notice
ithdrawal of counsel.

9/08/2000 Calendared
duled on: Thu, Nov. 09, 2000 at: 13:30
l: Full Court

)9/08/2000 Recusal Notice Sent
recused.

)9/19/2000 Called for Record
.ed Dist. Ct. and also sent Notice requesting record.

L0/03/2000 Voluntary Dismissal Requested Granted 10/06/2000 PHB

10/04/2000 Removed from Calendar

10/05/2000 Record Filed - Civil
rd District sends 2 Envelopes ; 5 Vol. Depositions; 2 Vol Transcript;
olumes Pleadings., with Record Index.

10/06/2000 Voluntary Dismissal Granted 10/06/2000 PHB
ed upon the Stipulation of the parties and good cause appearing
refore, IT IS HEREBY ORDERED that the appeal in this action shall be,
the same hereby is, dismissed with prejudice, each pary to bear their
costs and attorney fees.

10/06/2000 Record Sent to T.Ct. (per requ

cord returned to 3rd Dist. Court.

10/06/2000 Notice of Decision

11/15/2000 Filed after the Fact

tice of Transcript of 4/13/98 hearing filed in 3rd Dist. Court. Sent by
rolyn Erickson, Transcriber.

==========

epared By	Phone	Date

Tab 6

D. Kendall Perkins USB#2566
Attorney for Plaintiffs
2417 East 9110 South
Sandy, Utah 84093
Telephone: (801) 942-2078
Fax: (801) 942-2703

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

CRESTWOOD COVE APARTMENTS BUSINESS TRUST, dba COTTONWOOD CREEK APARTMENTS and SHANGRI LA UBO,	:	AFFIDAVIT OF STANLEY L. WADE
	:	
vs.	:	Case No. 020911135
SHAWN TURNER and LARSEN KIRKHAM & TURNER	:	
	:	Judge: Robin W. Reese
Defendants		

After having been duly sworn, Stanley L. Wade hereby deposes and says:

1. At all material times, he was involved with and knowledgeable about events occurring in and about the Shangri La Apartments property and is able to state the following from his own personal knowledge.

2. After the Court entered its judgment in the matter of Shangri-La Garden Apartments vs UAW Properties et. al. on or about July 29, 1998, Plaintiffs were unable to raise the nearly $1,000,000 redemption fee and Defendants took possession of the Shangri La Apartment complex during about December 1998 and installed their own managers.

3. Defendants and their agents did not screen new tenants effectively and allowed a lower

quality of tenants to begin to occupy apartments at Shangri La. Defendants and their agents did not effectively manage the apartments. The result of this being that the tenants began to damage the apartments and did not dependably pay rent as they were obligated to do. The damage done was not repaired in a timely manner and the tenants were not held responsible for the damage done.

4. Defendants took the rent monies and monies generated by the on site coin operated washers and dryers and failed to pay the necessary expenses of the apartments thereby causing two detrimental results: the premises were not repaired and maintained as required; and certain repairs and ongoing expenses were not paid which caused the creditors to file liens against the property, all of which were resulting in an ongoing diminution of value of the property.

5. A fire occurred in one of the apartment buildings causing heavy damage to several apartments. Fire and resultant water damages occurred to the roof, insulation, ceilings, walls, windows, wiring, cabinets and floors of said apartments. Defendants had a partial roof repair done to keep weather out, but did not have the remaining damage repaired so as to allow re-renting of said apartments and replacement of the cash flow attributable thereto. Other than the roof, Defendants did not use the fire insurance proceeds resulting from said fire to repair the damaged apartments but took steps to divert said proceeds to their own use.

6. Defendants allowed the carports and fences appurtenant to said apartments to be damaged

without attempting to identify and impose responsibility on the parties causing the damage and without repairing the damage.

7. Approximately 18 months after having filed an appeal from the outcome at trial, and having observed the deterioration of the property and attendant diminution in value during the time the apartment property was in the hands of U.A.W. Properties, L.C. and DLM Investments, L.L.C., the matter was discussed with counsel. Said counsel indicated that the matter may not be scheduled for hearing by the Supreme Court for two or more years. Therefore, pursuant to advise of counsel, and to avoid further damage and diminution in value, Affiant deemed it to be a business necessity to negotiate a settlement agreement with U.A.W. Properties, L.C. and DLM Investments, L.L.C. in order to be able to end the progressive deterioration of the property. Said Settlement resulted in Plaintiffs again taking possession of the apartments and to be able to begin to repair and rehabilitate the premises and turn around a stream of events that had been resulting in a constant diminution of value thereof.

Dated this 13 day of Oct., 2003.

Stanley L. Wade

SUBSCRIBED AND SWORN TO before me this 13th day of November, 2003.

NOTARY PUBLIC

Residing at: Salt Lake, Utah

NOTARY PUBLIC
ROBYN CURRAH
3880 South 700 East
Salt Lake City, Utah 84106
My Commission Expires
April 10, 2005
STATE OF UTAH

D. Kendall Perkins
Attorney for Plaintiffs